Mohd Najib bin Hj Abd Razak & Anor v Government of Malaysia and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01(i)-18–05 OF 2022(W) AND 01(i)-17–05 OF 2022(W)
ABANG ISKANDAR PCA, MOHAMAD ZABIDIN CJ (MALAYA), NALLINI PATHMANATHAN, MARY LIM AND ABU BAKAR JAIS FCJJ
16 OCTOBER 2023

Constitutional Law — Legislation — Validity of impugned legislation — Whether s 106(3) of Income Tax Act 1967 ('the ITA') was unconstitutional — Whether s 106(3) of the ITA usurped judicial power by precluding court from entertaining taxpayer's defences when Inland Revenue applied to enter summary judgment for assessed tax — Whether such preclusion was only to enable assessed tax to be collected expeditiously under ITA's 'pay first, dispute later' regime — Whether taxpayer's right to dispute assessment remained unaffected by virtue of s 99(1) of the ITA and the right to appeal further to the courts — Whether s 106(3) of the ITA did not prejudice taxpayer's rights in any way nor usurp judicial power

The appellants herein ('Mohd Najib' and 'Mohd Nazifuddin') challenged the constitutionality of s 106(3) of the Income Tax Act 1967 ('the ITA') and called for it to be struck down under art 4(1) of the Federal Constitution ('the FC'). They contended that s 106(3) of the ITA contravened art 121 of the FC in that it usurped the judicial power of the court to determine a dispute between a taxpayer and the respondent over the latter's claim for unpaid tax since the provision precluded the court from entertaining any plea that the taxed amount was excessive, incorrectly assessed, under appeal or incorrectly increased. In effect, the appellants argued, the court was asked to unquestioningly grant judgment against the taxpayer for the amount of tax that had been assessed by the Director-General of Inland Revenue ('DGIR') as due and payable. The appellants contended that s 106(3) of the ITA also contravened arts 5(1) and 8(1) of the FC in that they were denied of a fair trial and of the right of access to justice and were not accorded the same treatment that the law accorded to the respondent. The respondent refuted the appellants' contentions and submitted that the provisions in the ITA relating to tax collection and recovery were modeled on a 'pay first, dispute later' concept to ensure that revenue from tax collection for the requirements of the nation was not stultified by unscrupulous taxpayers resorting to various delaying tactics to avoid or evade paying tax. The respondent submitted that the ITA did not usurp judicial power or deny the taxpayer of his rights to dispute the assessed tax. The taxpayer had the right, under s 99(1) of the ITA, to appeal against all aspects of the assessment to the Special Commissioners of Income Tax ('SCIT') and, if dissatisfied with the SCIT's ultimate decision, to appeal further on

questions of law to the superior courts, beginning with the High Court. In addition, the taxpayer had the right to resort to administrative or constitutional judicial review or, if sufficient grounds were made out, to apply to court to stay enforcement. The respondent submitted that whilst the amount of tax assessed by the DGIR became a statutory debt that was due and payable to the respondent under s 106(1) of the ITA when the time-limit for payment had expired, the usual course adopted for recovery was to obtain summary judgment for the debt under O 14 of the Rules of Court 2012 during which process the court was barred, under s 106(3) of the ITA, from entertaining any plea from the taxpayer disputing the taxed amount as the whole purpose at that juncture was to obtain judgment so that the same could be enforced expeditiously in the public interest. The respondent stressed that the summary judgment that was obtained under s 106 ITA was solely for the purpose of tax recovery and collection and did not affect the taxpayer's rights to dispute the debt subsequently and if either the SCIT, or the courts thereafter, decided in favour of the taxpayer, the latter's liability stood to be reduced or extinguished and any amount of tax that had erroneously been paid would be refunded to the taxpayer under s 111 of the ITA. In the instant appeals, the High Court had allowed the respondent's summary judgment applications against Mohd Najib and Mohd Nazifuddin for the respective sums of RM1,692,872,924.83 and RM37,644,810.73 being additional income tax together with penalties which they had allegedly not paid for the years of assessment 2011 until 2017. The High Court refused to entertain the appellants' objections that the assessments were grossly incorrect and without basis, holding that those objections were solely fit for the SCIT to determine pursuant to the appeal procedure under s 99(1) of the ITA. The Court of Appeal's affirmation of the decisions of the High Court resulted in the instant appeals.

Held, unanimously dismissing the appeals:

(1) The purpose of the ITA as outlined in the Hansard was to ensure that there was full and speedy settlement of tax debts and that recalcitrant taxpayers did not use objections and the appeal procedure to defer payment of their taxes indefinitely. It was in the public interest that taxes were collected expeditiously. The Federal Constitution subsisted in, and for, the public interest and the nation as a whole. The 'pay first, dispute later' system of tax collection and recovery under the ITA served the public interest in terms of the fiscal needs of the public and the nation as a whole (see para 96).

(2) Consonant with the 'pay first, dispute later' system, s 106(1) of the ITA provided that tax that had been assessed as due and payable was recoverable by way of civil proceedings as a debt due to the Government. This did not mean that the 'statutory debt' under s 106 was final but that it merely facilitated an enforcement and recovery mechanism to meet the needs of collecting the sum due from the taxpayer first whilst postponing

the adjudication of the debt on its merits to a later date. The taxpayer was entitled to appeal to the Special Commissioners of Income Tax ('SCIT') against the assessment under s 99(1) of the ITA and, thereafter, to appeal further against the decision of the SCIT to the entire hierarchy of the superior courts on questions of law. Judicial power was thus preserved in the ITA for adjudication of the taxpayer's dispute, notwithstanding an earlier collection mechanism. When this was considered together with the subsisting supervisory judicial powers of the court and the statutory entitlement of the taxpayer to a refund of any sum that had been erroneously claimed or assessed, it could not be said that judicial power had been abrogated or removed. Dispute resolution was simply deferred to enable collection to take place first (see paras 66–67, 91 & 94–95).

(3) Neither s 106(3) nor the other subsections of s 106 and s 103 in their entirety, taken in the context of the ITA, had the effect of ousting, suspending or abrogating judicial power. On the contrary, when read in context and purposively, they allowed for judicial intervention and the judicial process to take its full course. The ITA allowed for an appeal process which subsequently led to a full appeal before the hierarchy of the superior courts, the grant of a stay at the discretion of the court and the right of judicial review. The preclusion in s 106(3) of the ITA that the court was not to consider certain defences relating solely to the assessed amount did not curtail, but merely deferred, the taxpayer's right to raise those defences subsequently (see paras 143–144 & 169).

(4) It was only in relation to the immediate collection and recovery of tax due and payable under the ITA that the court undertook a recovery function to give effect to the purpose and object of the 'pay first, dispute later' model embedded in the ITA without negating, abrogating or suspending judicial power in any way. Section 106(3) of the ITA was therefore neither invalid nor unconstitutional. It did not contravene art 5(1) of the FC by denying the taxpayer of the right to a fair trial or the right of access to justice. And there was no basis to contend that art 8(1) of the FC had been infringed as the respondent was carrying out a public function in levying tax and was, in that context, neither a 'person' within art 8 (for the anti-discriminatory argument to be invoked) nor had the respondent singled out the appellants from all other citizens of the nation for any discriminatory treatment in the levying of the tax (see paras 145, 214 & 225–226).

(5) Where the O 14 summary judgment procedure was employed to obtain judgment for the statutory debt under s 106(1) ITA, the purpose and intent of the ITA did not envisage the court undertaking a rights-determining trial under s 106. It was not tenable for a s 106 debt to be determined finally at trial if the taxing statute also prescribed a specific manner of challenging the tax assessed, as was the case under the

ITA. If it was found under the O 14 procedure that the matter should go to trial, it would render the method prescribed under the ITA for adjudication, nugatory. The judgment obtained was only for the purposes of collection and recovery of the tax and did not enjoy the rights-determining character of finality that a judgment delivered after full adjudication in a court of law enjoyed. The courts below in the instant appeals recognised that the merits of the dispute were properly to be determined under s 99(1) of the ITA (see paras 174–176 & 184).

(6) The courts below were entirely correct in their respective decisions. The defences put forward by the appellants did not warrant examination during the proceedings for the entry of the s 106 of the ITA judgment. Those defences, if raised, were properly the subject-matter for full ventilation before the SCIT and, after that, the High Court, on points of law (see paras 185–186).

[Bahasa Malaysia summary

Perayu-perayu di sini ('Mohd Najib' dan 'Mohd Nazifuddin') mencabar keperlembagaan s 106(3) Akta Cukai Pendapatan 1967 ('ACP') dan menggesa ia dimansuhkan di bawah perkara 4(1) Perlembagaan Persekutuan ('PP'). Mereka berhujah bahawa s 106(3) ACP melanggar perkara 121 PP kerana ia melangkaui kuasa kehakiman mahkamah untuk menentukan pertikaian antara pembayar cukai dan responden mengenai tuntutan cukai yang tidak dibayar kerana peruntukan tersebut menghalang mahkamah daripada melayan sebarang pengakuan bahawa amaun yang dicukai adalah berlebihan, ditaksir secara salah, di bawah rayuan atau dinaikkan secara salah. Sebenarnya, perayu-perayu berpendapat, mahkamah diminta memberikan penghakiman secara tanpa dipersoalkan terhadap pembayar cukai untuk jumlah cukai yang telah ditaksirkan oleh Ketua Pengarah Hasil Dalam Negeri ('KPHDN') sebagai kena dibayar dan perlu dibayar. Perayu-perayu berpendapat bahawa s 106(3) ACP juga melanggar perkara 5(1) dan 8(1) PP kerana mereka dinafikan daripada perbicaraan yang adil dan hak untuk mendapatkan keadilan dan tidak diberikan layanan yang sama seperti yang diberikan undang-undang kepada responden. Responden menafikan pendapat perayu dan berhujah bahawa peruntukan dalam ACP berkaitan kutipan dan pemulihan cukai dimodelkan pada konsep 'bayar dahulu, pertikai kemudian' bagi memastikan hasil daripada kutipan cukai untuk keperluan negara tidak terpengaruh oleh pembayar cukai yang tidak bertanggungjawab menggunakan pelbagai taktik penangguhan untuk mengelak atau lari daripada membayar cukai. Responden berhujah bahawa ACP tidak merampas kuasa kehakiman atau menafikan pembayar cukai haknya untuk mempertikaikan cukai yang ditaksir. Pembayar cukai mempunyai hak, di bawah s 99(1) ACP, untuk merayu terhadap semua aspek pentaksiran kepada Pesuruhjaya Khas Cukai Pendapatan ('PKCP') dan, jika tidak berpuas hati dengan keputusan muktamad PKCP, untuk merayu lebih lanjut mengenai persoalan

undang-undang kepada Mahkamah Tertinggi, bermula dengan Mahkamah Tinggi. Di samping itu, pembayar cukai mempunyai hak untuk menggunakan semakan kehakiman pentadbiran atau perlembagaan atau, jika alasan yang mencukupi dibuat, untuk memohon kepada mahkamah untuk menggantung penguatkuasaan. Responden berhujah bahawa walaupun amaun cukai yang ditaksir oleh KPHDN menjadi hutang berkanun yang perlu dan harus dibayar kepada responden di bawah s 106(1) ACP apabila had masa untuk pembayaran telah tamat, jalan biasa yang diterima pakai untuk pemulihan adalah dengan dapatkan penghakiman ringkas bagi hutang di bawah A 14 Kaedah-Kaedah Mahkamah 2012 yang semasa proses mahkamah telah dihalang, di bawah s 106(3) ACP, daripada melayan sebarang pengakuan daripada pembayar cukai yang mempertikaikan jumlah cukai kerana keseluruhan tujuan pada ketika itu adalah untuk mendapatkan penghakiman supaya perkara yang sama dapat dikuatkuasakan dengan segera demi kepentingan awam. Responden menegaskan bahawa penghakiman ringkas yang diperoleh di bawah s 106 ACP adalah semata-mata untuk tujuan kutipan cukai dan kutipan dan tidak menjejaskan hak pembayar cukai untuk mempertikaikan hutang tersebut kemudiannya dan jika sama ada PKCP, atau mahkamah selepas itu, memutuskan memihak kepada pembayar cukai, liabilitinya akan dikurangkan atau dipadamkan dan sebarang amaun cukai yang telah tersalah bayar akan dikembalikan kepada pembayar cukai di bawah s 111 ACP. Dalam rayuan semasa, Mahkamah Tinggi telah membenarkan permohonan penghakiman ringkas responden terhadap Mohd Najib dan Mohd Nazifuddin bagi jumlah masing-masing RM1,692,872,924.83 dan RM37,644,810.73 sebagai cukai pendapatan tambahan berserta penalti yang didakwa mereka tidak bayar pada tahun-tahun taksiran 2011 sehingga 2017. Mahkamah Tinggi enggan melayan bantahan perayu-perayu bahawa taksiran tersebut adalah sangat tidak betul dan tanpa asas, dengan memutuskan bahawa bantahan tersebut adalah wajar untuk ditentukan oleh PKCP menurut prosedur rayuan di bawah s 99(1) ACP. Pengesahan Mahkamah Rayuan terhadap keputusan Mahkamah Tinggi menyebabkan rayuan semasa.

Diputuskan, sebulat suara menolak rayuan:

(1) Tujuan ACP seperti yang digariskan dalam Hansard adalah untuk memastikan bahawa terdapat penyelesaian penuh dan cepat bagi hutang cukai dan pembayar cukai yang keras hati tidak menggunakan bantahan dan prosedur rayuan untuk menangguhkan pembayaran cukai mereka selama-lamanya. Ia adalah demi kepentingan awam bahawa cukai dikutip dengan cepat. Perlembagaan Persekutuan wujud dalam, dan untuk, kepentingan awam dan negara secara menyeluruh. Sistem pungutan dan pemulihan cukai 'bayar dahulu, pertikai kemudian' di bawah ACP memenuhi kepentingan awam dari segi keperluan fiskal orang ramai dan negara secara keseluruhan (lihat perenggan 96).

(2) Selaras dengan sistem 'bayar dahulu, pertikai kemudian', s 106(1) ACP

memperuntukkan cukai yang telah ditaksir sebagai kena dibayar dan harus dibayar boleh diperoleh semula melalui prosiding sivil sebagai hutang yang perlu dibayar kepada Kerajaan. Ini tidak bermakna bahawa 'hutang berkanun' di bawah s 106 adalah muktamad tetapi ia hanya memudahkan penguatkuasaan dan mekanisme pemulihan untuk memenuhi keperluan memungut jumlah terhutang daripada pembayar cukai terlebih dahulu sambil menggantung penghakiman hutang atas meritnya kepada tarikh kemudian. Pembayar cukai berhak merayu kepada Pesuruhjaya Khas Cukai Pendapatan ('SCIT') terhadap taksiran di bawah s 99(1) ACP dan, selepas itu, untuk merayu selanjutnya terhadap keputusan SCIT kepada seluruh hierarki Mahkamah Tertinggi pada persoalan undang-undang. Oleh itu, kuasa kehakiman dikekalkan dalam ACP untuk penghakiman pertikaian pembayar cukai, walaupun terdapat mekanisme kutipan yang lebih awal. Apabila ini dipertimbangkan bersama-sama dengan kuasa kehakiman penyeliaan yang masih ada di mahkamah dan hak berkanun pembayar cukai untuk pembayaran balik mana-mana jumlah yang telah dituntut atau ditaksirkan secara salah, tidak boleh dikatakan bahawa kuasa kehakiman telah dimansuhkan atau dibuang. Penyelesaian pertikaian hanya ditangguhkan untuk membolehkan kutipan dilakukan terlebih dahulu (lihat perenggan 66–67, 91 & 94–95).

(3) Sama ada s 106(3) mahupun subseksyen lain s 106 dan s 103 secara keseluruhannya, diambil dalam konteks ACP, tidak mempunyai kesan memecat, menggantung atau membatalkan kuasa kehakiman. Sebaliknya, apabila dibaca dalam konteks dan bertujuan, mereka membenarkan campur tangan kehakiman dan proses kehakiman berjalan sepenuhnya. ACP membenarkan proses rayuan yang kemudiannya membawa kepada rayuan penuh di hadapan hierarki Mahkamah Tertinggi, pemberian penggantungan mengikut budi bicara mahkamah dan hak semakan kehakiman. Ketetapan dalam s 106(3) ACP bahawa mahkamah tidak mempertimbangkan pembelaan tertentu yang berkaitan semata-mata dengan jumlah yang ditaksir tidak menyekat, tetapi hanya menangguhkan, hak pembayar cukai untuk membangkitkan pembelaan tersebut kemudiannya (lihat perenggan 143–144 & 169).

(4) Ia hanya berhubung dengan kutipan serta-merta cukai yang harus dan perlu dibayar di bawah ACP barulah mahkamah menjalankan fungsi pemulihan untuk melaksanakan tujuan dan matlamat model 'bayar dahulu, pertikai kemudian' yang terkandung dalam ACP tanpa menafikan, membatalkan atau menggantung kuasa kehakiman dalam apa cara sekalipun. Oleh itu, s 106(3) ACP bukanlah tidak sah dan tidak berperlembagaan. Ia tidak melanggar perkara 5(1) PP dengan menafikan pembayar cukai hak untuk perbicaraan adil atau hak akses kepada keadilan. Dan tidak ada asas untuk menyatakan bahawa perkara 8(1) PP

telah dilanggar kerana responden menjalankan fungsi awam dalam mengenakan cukai dan, dalam konteks itu, bukan 'orang' dalam perkara 8 (untuk hujah anti-diskriminasi untuk diguna pakai) dan responden tidak memilih perayu daripada semua warganegara lain untuk sebarang layanan diskriminasi dalam mengenakan cukai (lihat perenggan 145, 214 & 225–226).

(5) Jika prosedur penghakiman ringkasan A 14 digunakan untuk mendapatkan penghakiman bagi hutang berkanun di bawah s 106(1) ACP, tujuan dan niat ACP tidak membayangkan mahkamah menjalankan perbicaraan penentu hak di bawah s 106. Ia tidak boleh dipertahankan bagi hutang s 106 ditentukan akhirnya dalam perbicaraan jika statut percukaian juga menetapkan cara tertentu untuk mencabar cukai yang ditaksirkan, seperti yang di bawah ACP. Jika didapati di bawah prosedur A 14 bahawa perkara itu harus dibawa ke perbicaraan, ia akan menjadikan kaedah yang ditetapkan di bawah ACP untuk adjudikasi, menjadi nugatori. Penghakiman yang diperolehi hanya untuk tujuan kutipan dan pemulihan cukai dan tidak menikmati sifat penentu hak kemuktamadan yang dinikmati oleh penghakiman selepas penghakiman penuh di mahkamah undang-undang. Mahkamah di bawah dalam rayuan semasa mengiktiraf bahawa merit pertikaian telah ditentukan dengan betul di bawah s 99(1) ACP (lihat perenggan 174–176 & 184).

(6) Mahkamah di bawah adalah betul sepenuhnya dalam keputusan masing-masing. Pembelaan yang dikemukakan oleh perayu tidak memerlukan pemeriksaan semasa prosiding untuk kemasukan penghakiman s 106 ACP. Pembelaan tersebut, jika dibangkitkan, adalah perkara utama teratur untuk penghujahan penuh di hadapan SCIT dan, selepas itu, Mahkamah Tinggi, mengenai perkara undang-undang (lihat perenggan 185–186).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)

Amraoti Electric Supply Co Ltd v NH Mujumdar ILR (1952) Nag 830; AIR 1953 Nag 35 (refd)

Arumugam Pillai v Government of Malaysia [1980] 2 MLJ 283, FC (refd)

BNCB v Babubhai (1987) 1 SCC 606, SC (refd)

Canada Sugar Refining Company Limited v The Queen [1898] AC 735, PC (refd)

Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services and another; Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services and another [2011] ZAWCHC 297, HC (refd)

Chong Woo Yit v Government of Malaysia [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9, SC (refd)

Comptroller of Income Tax v A Co Ltd [1966] 2 MLJ 282 (refd)

Deputy Commissioner of Taxation v Buzadzic [2019] VSCA 221, CA (refd)
Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors [2022] 3 MLJ 356; [2022] 5 CLJ 1, FC (refd)
Government of Malaysia v Abdul Rahman [1975] 1 MLJ 276 (refd)
Huddart Parker & Co Pty Ltd & Appleton v Moorehead (1909) 8 CLR 330, HC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (refd)
Kerajaan Malaysia v Abdul Rahim bin Mohd Aki [1994] MLJU 372, HC (refd)
Kerajaan Malaysia v Dato' Hj Ghani Gilong [1995] 2 MLJ 119, FC (refd)
Kerajaan Malaysia v Mudek Sdn Bhd [2017] 5 MLJ 133; [2017] 6 MLRA 25, FC (refd)
Kwasi Afrifa v Ghana Revenue Authority (Reference No J6/02/2022) [2022] DLSC 11868, SC (refd)
M/S Bajaj Hindustan Ltd v Sir Shadi Lal Enterprises Ltd (2011) 1 SCC 640, SC (refd)
Metcash Trading Limited v Commissioner for the South African Revenue Service and another (CCT3/00) [2000] ZACC 21, SC (refd)
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Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal [1994] 2 MLJ 601; [1994] 2 CLJ 705, SC (refd)
PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 (refd)
RM Seshadri v Second Additional Income-Tax Officer, Salaries Circle, Madras and another (1954) 2 MLJ 285; ILR (1954) Mad 1236; AIR 1954 Mad 806, HC (refd)
Richard Amo-Hene v Ghana Revenue Authority & 2 Ors [2022] DLSC 11872, SC (refd)
SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356; [2022] 3 CLJ 339, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Shell Company of Australia, Limited v Federal Commissioner of Taxation [1931] AC 275, PC (refd)
Sun Man Tobacco Co Ltd v Government of Malaysia [1973] 2 MLJ 163, FC (refd)
The Commissioner of Inland Revenue v Shelcore Hong Kong Limited [2011] HKCU 143 (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759; [2021] 5 CLJ 581, FC (refd)

Legislation referred to

Basic Law [HK] art 35
Bill of Rights Ordinance [HK] arts 10, 22
Civil Procedure Act 2010 [AU] s 61
Colonial Territories Income Tax Ordinance (1922)
Constitution of Ghana 1992 [GH] arts 2(1), 17(1), 19(2)(c), 23, 33(1), (5), 125(2), 130(1), 132, 133(1), 140
Constitution of the Republic of South Africa 1996 [SA] s 34
Courts of Judicature Act 1964 s 25, 25(2), Schedule
Federal Constitution arts 4, 4(1), 5, 5(1), 8, 8(1), 13, 96, 121, Part II
High Court (Civil Procedure) Rules 2004 [GH] O 54 r 4(1)
Income Tax Act 1967 ss 91(1), (3), 99, 99(1), 101(1), 102, 102(4), 103, 103(1), 103B, 104, 105, 106, 106(1), (3), 106A, 107, 107B, 110, 111, 111D, 134(2)(b), 136(2), 142, 142(1), 145(2)(c), Parts V, VI, Chapter 2, Part VI, Section 2, Part VII, Schedule 5, paras 23, 34, 42
Income Tax Assessment Act 1936 (Cth) [HK] s 175
Income Tax Ordinance 1947 (repealed by Income Tax Act 1967)
Income Tax Ordinance 1956 (repealed by Income Tax Act 1967)
Inland Revenue Ordinance 1960 (repealed by Income Tax Act 1967)
Inland Revenue Ordinance [HK] s 75
Interpretation Acts 1948 and 1967 s 17A
Revenue Administration Act 2016 [GH] s 42(5), (5)(b)
Rules of Court 2012 O 14, O 14 rr 1, 3
South African Income Tax Act 58 of 1962 [SA]
Supreme Court (General Civil Procedure) Rules 2015 [HK] r 22.03
Taxation Administration Act 1953 (Cth) [HK] ss 14ZZM, 350–10(1), Sch 1, item (2)
Town and Country Planning Act 1976
Value-Added Tax Act 89 of 1991 [SA] ss 36(1), 40(2)(a), (5), Part V

Appeal from: Civil Appeal No W-01(IM)(NCVC)-337–07 of 2020 (Court of Appeal, Putrajaya)

Muhammad Shafee Abdullah (with Rajan Navaratnam, Muhammad Farhan Shafee, Wee Yeong Kang, Wan Mohammad Arfan Wan Othman, Alaistair Brandah Norman, Oazair Tyeb and Mohamed Reza Rahim) (Shafee & Co) for the appellant.

Hazlina bt Hussain (with Norhisham bin Ahmad, Al-Hummidallah bin Idrus, Muhammad Faqrol Syazreen bin Mohd Ghause, Norazilah bt N Hamod @ Abdul Hamid, Mohamad Asyraf bin Zakaria, Muhammad Danial Izzat bin Zulbahari, Azleena bt Md Khairuddin, Ainur Mardiah bt Ramli, Qhistina bt Mohd Apandi, Komathi a/p P Karuppanan and Sakinah Najwa bt Hussin) (Inland Revenue Board of Malaysia) for the respondent.

Anand Raj (with New Sin Yew, Abhilaash Subramaniam, Foong Pui Chi, Preetha

Pillai, Vijey R Mohana Krishnan and Choo Kelly) (Shearn Delamore & Co) for the amicus curiae.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] The primary issue that falls for adjudication and decision in these two appeals brought by the appellants, Dato' Seri Mohd Najib bin Haji Abd Razak ('Najib Razak') and Mohd Nazifuddin bin Mohd Najib ('Nazifuddin'), is the constitutionality of s 106(3) of the Income Tax Act 1967 ('the ITA'). The primary ground put forward by the appellants is that s 106(3) usurps judicial power in art 121 of the Federal Constitution ('the FC'). It is also contended that the impugned section contravenes art 5(1) of the FC in that it does not accord the appellants a fair trial and impedes their right of access to justice.

[2] It is submitted that this contravention arises because s 106(3) expressly limits the defences available to a taxpayer seeking to challenge a summary claim brought by the respondent, the Government of Malaysia, represented by the Inland Revenue Board ('Inland Revenue') as a debt due, based on monies assessed to be due from the taxpayer. The statutory provision in issue, namely s 106(3) of the ITA, stipulates that 'the Court shall not entertain' any plea that the tax claimed is 'excessive, incorrectly assessed, under appeal or incorrectly increased …'. This limitation on defences that may be considered by the court, it is maintained, amounts to an usurpation of judicial power as stated above, and therefore warrants being struck down under art 4(1) of the FC.

[3] In further support of this primary assertion, it is contended that s 106(3) thereby precludes the right to a fair trial by the taxpayer, flouting art 5(1) of the FC which recognises this right as part of the right to life. Additionally, the appellants argue that art 8(1) of the FC is also contravened in that the Inland Revenue is accorded unlimited powers, creating a disparity between the rights of the Inland Revenue and the taxpayer. This, it is argued, amounts to a contravention of art 8 of the FC. The amicus curiae concurs with the appellants in that it is submitted that there is a contravention of art 8 of the FC as s 106(3) of the ITA ousts judicial power and has no rational nexus with the objective of the ITA.

[4] The Inland Revenue meets these arguments by responding that s 106(3) of the ITA does not usurp judicial power nor contravene art 121 of the FC because:

(a) the section, when construed in the context of the ITA holistically, does not preclude or obviate the taxpayer from putting forward these defences, but provides instead for such disputes to be first heard by the Special

Commissioners of Income Tax ('SCIT'), a specialist panel of tax commissioners, who are qualified to deal with such tax disputes. On such determination by the SCIT, the taxpayer has recourse to the court. The court exercises its power to hear an appeal premised on points of law. There is a right of appeal up to the Federal Court. As such, it cannot be said that judicial power is ousted under s 106(3) of the ITA. The ITA provides for a specific mode of adjudication under s 99(1) and Schedule 5 of the ITA;

(b) the Inland Revenue maintains that it cannot be said that a fair trial or access to justice is denied to the taxpayer because the court exercises its judicial power by way of appeal from the decision of the SCIT under s 99(1) of the ITA, even after the summary mode of enforcement is disposed of under s 106 of the ITA. All the defences of the taxpayer are available for review by the court after having initially been considered by the SCIT;

(c) this means that the judgment obtained summarily under s 106 of the ITA is not the final disposition of the taxpayer's rights. The taxpayer, if unsuccessful in opposing the summary application for judgment under s 106 of the ITA, in view of s 106(3) of the ITA, may have recourse to the SCIT and then the court again by way of appeal on points of law; and

(d) if the SCIT, in the course of its determination on the merits of the tax dispute, or the court by way of appeal on points of law, determines the dispute in favour of the taxpayer, his tax liability is then reduced or reversed, as the case may be. Access to justice, it is asserted, is not therefore precluded or negated under s 106(3) of the ITA.

THE UNDERLYING ISSUE

[5] It appears to this court that underlying these competing positions in relation to the constitutionality of s 106(3) of the ITA, the core issue that emerges for consideration is whether the system promulgated by Parliament under the ITA whereby the taxpayer is bound to make payment of the quantum assessed to be due by the Inland Revenue first, and only subsequently dispute the sum so assessed, passes the constitutionality test.

[6] The fact that the Act provides for a 'Pay first, dispute later' system is borne out, inter alia, by s 103(1) of the ITA which provides that tax payable under an assessment for a year of assessment shall be due and payable on the due date whether or not that person appeals against the assessment, read together with s 103B of the ITA which provides that for the purposes of collection and recovery of taxes only, in Part VII of the ITA, the institution of any proceedings under any other written law against the Inland Revenue, does not absolve or exempt the taxpayer from making payment for the purposes of

collection of tax pending the adjudication of the taxpayer's dispute.

[7] In other words, collection of tax by the Inland Revenue is accorded immediacy while the disputes raised by the taxpayer are deferred for adjudication to a later time.

[8] And this is because once judgment is obtained summarily by the Inland Revenue, based on s 106(1) of the ITA, as a debt recoverable by it against the taxpayer, it becomes incumbent upon the taxpayer, such as the appellants, to make the payment due to the Revenue *first*, while the dispute relating to any of the defences relating to quantum etc, proceed to resolution, first through the SCIT, and then the court, by way of appeal on points of law. If the taxpayer is successful, the monies paid out by him, are then reimbursed to the taxpayer by the Inland Revenue under s 111 of the ITA. The effective challenge by the appellants is the constitutionality of such a system or mechanism.

[9] Although collection might precede the full adjudication of the dispute, it is relevant to note that the Director-General of Inland Revenue ('DGIR') possesses the power and discretion to allow for suspension, payment in instalments, partial payment and a variety of other means as an alternative to payment in full immediately (see s 107B of the ITA for instance). Similarly, the courts have the power to stay full enforcement on failure to pay by the taxpayer pending appeals, if sufficient grounds are made out.

[10] Put another way, the challenge on the constitutionality of s 106(3) of the ITA effectively contests and seeks the removal of the operation of the tax legislation enacted by Parliament, which provides for a 'Pay first, dispute later' structure.

[11] The striking down of s 106(3) would mean that defences stipulated under the section as not available to the taxpayer, could in fact be heard by way of defence under a claim to judgment under s 106 of the ITA. This in turn would result in a full adjudication of the Inland Revenue's claim by the courts at first instance, rather than being heard by the SCIT at first instance, and subsequently by the courts on appeal. It would also mean that the procuring of payment of tax upon assessment would be delayed until the completion of the entirety of court proceedings at all levels of the hierarchy of the courts.

[12] Having set out in a nutshell the scope of the dispute, we turn to the background facts and issues that arise in these appeals, as indicated in part at least, by the questions of law before us.

A THE BACKGROUND FACTS

[13] The respondent filed separate applications for summary judgment to be entered against the appellants under s 106 of the ITA, for the respective sums of RM1,692,872,924.83 and RM37,644,810.73 being additional income tax together with penalties which the appellants allegedly failed to pay for the years of assessment 2011 to 2017.

[14] The summary judgment applications against Najib Razak and Nazifuddin were heard before Ahmad bin Bache J and Ahmad Zaidi bin Ibrahim J respectively. Both High Court judges allowed summary judgment to be entered against the two appellants.

[15] Dissatisfied with the decisions of the High Court, both appellants separately appealed to the Court of Appeal. Both appeals were heard together. The Court of Appeal dismissed the appeals and upheld the decisions of the High Court. Dissatisfied with the decision of the Court of Appeal, both appellants appealed to the Federal Court.

E PROCEEDINGS IN THE LOWER COURTS

High Court

[16] Ahmad bin Bache J allowed summary judgment to be entered against Najib Razak on the following grounds:

(a) the notice of assessment (additional) for the years 2011 to 2017 had been duly served on Najib Razak on 20 March 2019. The court was satisfied that the additional assessment and the increases were in accordance with the ITA;

(b) Najib Razak's failure to pay the total amount of arrears of additional income tax was further confirmed by the issuance of a certificate of indebtedness dated 5 August 2019 pursuant to s 142(1) of the ITA. The total amount of additional income tax became recoverable as tax that was due and payable under the ITA;

(c) following the line of authorities including *Chong Woo Yit v Government of Malaysia* [1989] 1 MLJ 473; [1989] 1 CLJ Rep 9 ('Chong Woo Yit'), *Sun Man Tobacco Co Ltd v Government of Malaysia* [1973] 2 MLJ 163 (*Sun Man Tobacco*), *Arumugam Pillai v Government of Malaysia* [1980] 2 MLJ 283 (*Arumugam Pillai*), *Government of Malaysia v Abdul Rahman* [1975] 1 MLJ 276 (*Abdul Rahman*), *Kerajaan Malaysia v Abdul Rahim bin Mohd Aki* [1994] MLJU 372 (*Abdul Rahim*) learned judge held that on a plain reading, once Najib Razak had been served with a notice of assessment, the court in a civil proceeding brought by the

Inland Revenue will not entertain any plea that the amount is excessive, incorrectly assessed, under appeal or whatsoever, unlike the SCIT who remain the judges of fact;

(d) Najib Razak's pleas that the assessments are grossly incorrect and without basis, as a substantial amount of the income came from donations received from an Arab donor and political donations and are therefore not taxable, are all questions of fact. The learned judge held that the merit of assessments which involve questions of fact should be heard by the SCIT. The SCIT are the judges of fact;

(e) further, s 106(3) of the ITA is triggered where the court cannot entertain any plea regarding the amount of tax sought to be recovered on the ground that the assessment is excessive or incorrectly assessed. The learned judge also held Najib Razak could dispute the assessment under s 99 of the ITA to the SCIT;

(f) s 106(3) of the ITA does not contravene art 13 of the FC as s 106 of the ITA is merely a method of recovery which is clearly provided under the law;

(g) s 106(3) of the ITA does not usurp judicial power as the right of the taxpayer is protected and guaranteed under s 99 of the ITA by way of an appeal to the SCIT. Subsequently, the taxpayer if dissatisfied with the decision, he may appeal to the High Court against the decision of the SCIT. Therefore, judicial powers remain vested in the court to determine the correctness of the assessments;

(h) *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 (*Semenyih Jaya*) was distinguished from the present case as in that in the present case, the correctness of the assessment is appealable to the SCIT and a further appeal may lie to the High Court;

(i) additionally, if the court is to decide on the issue of whether or not the amount received by Najib Razak is subject to tax, or is wrongly calculated, this will preclude the SCIT, who are the judges of facts, from deciding the same questions, as the SCIT would regard themselves as bound by the decision of the High Court, as decided by the Supreme Court in *Kerajaan Malaysia v Dato' Hj Ghani Gilong* [1995] 2 MLJ 119 (*Dato' Hj Ghani Gilong*);

(j) Ahmad Zaidi bin Ibrahim J, too, allowed summary judgment to be entered against Nazifuddin on the following grounds:

(i) the notice of assessment (additional) for the years 2011 to 2017 had been duly served on Nazifuddin in compliance with s 145(2)(c) of the ITA on 18 March 2019. The fact that Nazifuddin had then filed an appeal to the SCIT via Form Q on 10 April 2019 further

supported the Inland Revenue's submission that the notices had been served on 18 March 2019. Nazifuddin had also admitted the service of the notices on him;

(ii) although Nazifuddin had filed an appeal to the SCIT in respect of the notice, the Inland Revenue could recover the tax payable via a civil proceeding following the settled position of the law in *Chong Woo Yit* where the Supreme Court held:

> [2] On service of a notice of assessment ... the tax payable under the assessment becomes due and payable whether or not the person appeals against the assessment and would be recovered by the Government by civil proceedings as a debt due to the Government.

(iii) Nazifuddin's submission that the additional tax for the years 2011 to 2017 is time-barred pursuant to s 91(1) of the ITA is not a triable issue. The law is settled that the issue of limitation is to be raised before and decided by the SCIT. This principle was laid down by the Federal Court in *Dato' Hj Ghani Gilong*. The court also highlighted that pursuant to s 91(3) of the ITA, the Inland Revenue has the power to make an additional assessment beyond the limitation period ie, in cases where it appears there has been fraud, wilful default or negligence;

(iv) on Nazifuddin's submission that there has been an incorrect calculation of the additional tax assessment, the learned judge found that it is not an issue to be tried following s 106(3) of the ITA and as determined in *Abdul Rahman*, *Chong Woo Yit*, *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282 (*A Co Ltd*);

(v) on the constitutionality of s 106 of the ITA, the learned judge held that it is constitutional following several Federal Court cases including *Kerajaan Malaysia v Mudek Sdn Bhd* [2017] 5 MLJ 133; [2017] 6 MLRA 25, *Chong Woo Yit* and *Sun Man Tobacco Co Ltd*. The learned judge further stated that in the case of *Semenyih Jaya*, it was observed by the Federal Court that the SCIT is a body which performs a judicial function; and

(vi) an appeal to the SCIT would not prevent Nazifuddin from obtaining justice as he could appeal to the High Court via the case stated process under s 99 of the ITA.

Court of Appeal

[17] The Court of Appeal upheld the decisions of the High Court.

THE QUESTIONS OF LAW

[18] On 10 May 2022, the appellants obtained leave to appeal to this court on the following questions of law:

(a) question 1: whether s 106(3) of the Income Tax Act 1967 contravenes art 121 of the Federal Constitution;

(b) question 2: whether s 106(3) of the Income Tax Act 1967 is unconstitutional and/or ultra vires as it usurps the judicial power of this Honourable Court guaranteed by art 121 of the Federal Constitution;

(c) question 3: whether, by reason of ss 103 and 106(3) of the Income Tax Act 1967, this court is wholly prevented from considering whether or not there are triable issues and/or some other reason warranting a trial (within the meaning of O 14 r 1 and O 14 r 3 of the Rules of Court 2012), before deciding whether or not to give judgment in favour of the plaintiff, despite the fundamental liberties, rights and powers enshrined in, inter alia, arts 5, 8 and 121 of the Federal Constitution;

(d) question 4: whether art 121 of the Federal Constitution, which guarantees the judicial power of this Honourable Court, is relevant in the determination of civil recovery proceedings in tax matters (including in summary judgment proceedings therein);

(e) question 5: whether O 14 r 3 of the Rules of Court 2012, which provides that a summary judgment application may be dismissed if a defendant can show 'some other reason' for a trial to be held, applies in civil recovery proceedings in tax matters;

(f) question 6: whether in instances of manifest and obvious errors in calculation of a tax assessment, a court is entitled by virtue of its inherent and judicial powers to consider a defendant's defence of merit to dismiss or set aside an application for summary judgment by a plaintiff and order full trial on the matter;

(g) question 7: whether the judicial power of the Federation that is vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a tax recovery suit filed under s 106(1) of the Income Tax Act 1967 on the basis of s 106(3) of the same Act;

(h) question 8: whether the judicial power of the Federation vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a tax recovery suit filed under s 106(1) of the Income Tax Act 1967 on the grounds that an appeal to the Special Commissioner of Income Tax has been filed under s 99 of the Income Tax Act 1967; and

(i) question 9: whether a defendant's defence as to the plaintiff's conduct of bad faith, mala fide, oppression, unconscionability, irresponsibility, unreasonableness and/or abuse of process falls within the scope of s 106(3) of the Income Tax Act 1967, and whether the courts are entitled to consider such a defence as a triable issue and/or some other reason warranting a trial in the context of civil recovery proceedings in tax matters (including in summary judgment proceedings therein).

[19] We now turn to consider the questions of law in categories germane to the issues they raise. On the basis of the subject matter of the issues raised we consider the questions in the following categories:

(a) category 1: questions 1, 2 and 4 all relate to judicial power;

(b) category 2: questions 3, 5 and 6 all of which deal with the workings of summary judgment in the context of s 106 of the ITA;

(c) category 3: questions 7 and 8 as they deal with the concept of the 'suspension' or 'abrogation' of judicial power by reason of ss 106(3) and 99 of the ITA; and

(d) category 4: question 9 which deals with issues of bad faith, mala fides and oppression in the context of s 106(3) of the ITA, and whether the courts are entitled to consider such a defence as a triable issue or some other reason warranting a trial in the context of s 106 summary judgment proceedings.

OUR DELIBERATIONS AND ANALYSIS IN RELATION TO THE QUESTIONS OF LAW IN CATEGORY 1

[20] The relevant questions that fall for consideration here are as follows:

(a) question 1: whether s 106(3) of the Income Tax Act 1967 contravenes art 121 of the Federal Constitution;

(b) question 2: whether s 106(3) of the Income Tax Act 1967 is unconstitutional and/or ultra vires as it usurps the judicial power of this Honourable Court guaranteed by art 121 of the Federal Constitution; and

(c) question 4: whether art 121 of the Federal Constitution, which guarantees the judicial power of this Honourable Court, is relevant in the determination of civil recovery proceedings in tax matters (including in summary judgment proceedings therein).

[21] All these questions essentially challenge s 106(3) of the ITA as being unconstitutional on the ground that the provision usurps judicial power under art 121 of the FC.

THE APPELLANTS' SUBMISSIONS IN SUMMARY

[22] The appellants submit that the terminology of s 106(3) of the ITA which stipulates that 'the court shall not entertain' any plea in relation to the assessment renders the court a mere 'rubber stamp', whereby the Inland Revenue makes a decision on the tax payable and the court merely 'anoints' the decision of the Inland Revenue which offends the principle of judicial power under art 121 of the FC.

[23] Their submissions may be summarised as follows:

(a) s 106(3) of the ITA usurps the judicial powers of the High Court in light of art 121 of the FC;

(b) s 106(3) of the ITA in effect renders the courts a mere 'rubber stamp', whereby the respondent makes a decision on the tax payable and the courts merely 'anoint' the decision of the respondent which offends the principle of judicial power under art 121 of the FC as highlighted in *Semenyih Jaya*;

(c) the fact that an assessment is appealable to the SCIT and the court does not justify the conclusion that s 106(3) of the ITA is unconstitutional as there is no nexus between the appealability of an assessment to the SCIT and s 106(3) as the two provisions are separate and distinct. A civil suit may still be filed after the SCIT and the courts have determined the question of law in which event s 106(3) becomes operative;

(d) s 106(3) of the ITA must be examined in light of the Federal Constitution to determine its constitutionality as per the case of *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116;

(e) s 106(3) of the ITA has the effect of making the rights of a taxpayer 'ineffective or illusory' because a person seeking to defend the suit may come to court but he cannot furnish any defences available to him; and

(f) s 106(3) of the ITA elevates the Inland Revenue to the 'untouchable' position of having essentially unlimited powers in relation to tax matters. In this sense, it creates a disparity between the rights of the Inland Revenue and those of the normal taxpayer to be treated equally under the law which is guaranteed under art 8 of the FC.

THE RESPONDENT'S SUBMISSIONS IN SUMMARY

[24] The respondent's answer to this is that the recourse for any party aggrieved by the DGIR's assessment is to appeal to the SCIT. The SCIT, being the judges of fact, have the jurisdiction to decide on disputes relating to tax assessments. The respondent also points out that the SCIT's decision is not

final and is appealable to the High Court on a question of law.

[25] The respondent's submissions are as follows:

(a) s 106(3) of the ITA does not violate art 121 of the FC, as art 121 of the FC must be read with federal laws passed by Parliament which may prescribe the extent of the jurisdiction and powers of the court;

(b) s 106(3) of the ITA being a federal law prevents the court from deciding any taxpayer's plea that the amount of tax sought is excessive, incorrectly assessed, under appeal or incorrectly increased;

(c) the court remains the ultimate decision maker and is not precluded from considering matters other than what has been stipulated in s 106(3) of the ITA distinguishing the instant case with *Semenyih Jaya*;

(d) the recourse to any party aggrieved by the DGIR's assessment is to appeal to the SCIT. The SCIT, being the adjudicator of fact, has the jurisdiction to decide on the dispute regarding the tax assessment. The respondent highlighted that the SCIT's decision is not final and is appealable to the High Court on questions of law;

(e) if the High Court decides on questions of fact it could lead to inconsistent decisions by the High Court and the SCIT as per *Dato' Hj Ghani Gilong*;

(f) s 106(3) of the ITA does not violate arts 5 and 8 of the FC as decided by case-law including *Sun Man Tobacco Co Ltd*; and

(g) the tax recovery system in our country is similar to countries such the United Kingdom, Hong Kong and Australia where the appeal on the assessment is to be decided by a specialist tribunal before an appeal to the High Court.

SUBMISSIONS OF AMICUS CURIAE

[26] In summary, the *amicus curiae* submitted that:

(a) s 106(3) of the ITA is unconstitutional and should be struck down for being in violation of arts 121, 4, 5 and 8 of the FC (especially in the light of the recent cases of *Semenyih Jaya*, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145 (*Indira Gandhi*), and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 (*Alma Nudo*));

(b) the court's function to decide on the assessment appears to have been delegated to the SCIT with the effect that the High Court, in civil proceedings brought by the respondent under s 106(3) of the ITA, acts as

a mere rubber stamp, being compelled to grant judgment in favour of the respondent;

(c) the implications of cases such as *Sun Man Tobacco*, *Arumugam Pillai*, *NTS Arumugam Pillai v Government of Malaysia* [1976] 2 MLJ 72 (FC), *Chong Woo Yit*, *Dato' Hj Ghani Gilong* and *Kerajaan Malaysia v Mudek Sdn Bhd* are that the court has 'no power' and must 'mechanically and blindly' grant summary judgment in favour of respondent pursuant to s 106(3) of the ITA. This reduces the powers of the High Court such that an inferior tribunal ('SCIT') and the respondent have greater judicial powers than the High Court;

(d) judgments should not be granted automatically or mechanically in any case, as that would be the very antithesis of the judiciary's constitutional role to sit in judgment of disputes;

(e) the SCIT in exercising their function cannot impinge on the judicial power of the judiciary;

(f) s 106(3) of the ITA is arbitrary because the measure taken (to oust judicial power) has no rational nexus with the objective of the ITA;

(g) s 106 of the ITA violates art 8(1) of the FC because the measure taken (to oust judicial power) is disproportionate to the aim the ITA seeks to achieve; and

(h) s 106 of the ITA engages art 8(1) of the FC in two respects. First, it infringes a person's presumption of innocence and right to fair trial under art 5 of the FC. Second, in civil proceedings, it discriminates against the taxpayer defendant by putting them in an unequal position in litigation where it can demand judgment in its favour, regardless of the merits of the taxpayer's case.

OUR ANALYSIS ON THE QUESTIONS OF LAW IN CATEGORY 1 IE QUESTIONS 1, 2 AND 4 IN RELATION TO WHETHER S 106(3) ENCROACHES ON JUDICIAL POWER

[27] We commence with a consideration of the constitutional principles applicable when a court is undertaking a review of the constitutionality of a statutory provision or statute under arts 4(1) and 121 of the FC.

CONSTITUTIONAL PRINCIPLES

[28] Article 4(1) of the FC is the central feature of our Federal Constitution which allows for the review of all legislation including the Constitution itself (see *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581, *Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356; [2022] 5 CLJ 1). Judicial review

is a cardinal feature of judicial power. As recognised by this court in *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356; [2022] 3 CLJ 339, judicial review in Malaysia encompasses constitutional judicial review and administrative judicial review.

[29] When the validity of a statute is being impugned on the ground that it is in contravention with the Federal Constitution, the court exercises its inherent and constitutional powers of judicial review under art 4(1) of the FC.

[30] Constitutional judicial review is to be contrasted with administrative judicial review in that the latter involves the supervision of the acts and/or omissions of public law bodies per se without challenging the validity of a specific legislative provision.

[31] The determination of the validity of a written law that is challenged as being ultra vires the Federal Constitution is an exercise of construction which is to be undertaken in accordance with established constitutional principles. This is equally true for tax or fiscal statutes as it is for any other statute.

[32] The determination involves a two-fold process of interpretation vis a vis the Constitution and the impugned statute. The substance and effect of the impugned legislation is to be benchmarked against the breadth and scope of the constitutional provision it allegedly impinges upon. In other words, the process to be undertaken may be summarised as follows:

(a) what is the true scope and implication of the relevant provision of the Federal Constitution which is alleged to be transgressed?

(b) what is the substance and effect of the impugned statute or statutory provision on its true construction?

(c) the court then has to consider whether the impugned statute or statutory provision is capable of a construction which is consistent with the constitutional provision;

(d) if the impugned statute or provision can be so construed no contravention arises. Alternatively, if it appears to confer untrammelled powers when construed, it should be read down first, in order to uphold the provision. It is only where the construction of the impugned statute or provision lends itself to only one meaning that the power to strike down under art 4(1) of the FC should be utilised;

(e) to that extent constitutional review of a statute by the Judiciary under art 4(1) of the FC is an iterative process;

(f) in determining in (a) and (b), the meaning of a statutory provision and the intention of the Legislature in enacting the same can only be properly construed by considering the whole of the statute and every part of it (see *BNCB v Babubhai* (1987) 1 SCC 606 (para 4) where it was held, inter alia, that '... It is an elementary rule that construction of a section is to be made of all parts together. It is not permissible to omit any part of it. For, the principle that the statute must be read as a whole is equally applicable to different parts of the same section';

(g) the position in this jurisdiction is provided for by statute in s 17A of the Interpretation Acts 1948 and 1967. The section requires any construction to take into account the words of the statute in the context and purpose of the statute. This means that the intention of the Legislature behind a particular provision can only be properly understood by a consideration of the whole instrument and every part of it. The meaning is to be drawn from the context of the Act using the words in the impugned section, other sections in the Act or the scheme of the Act in general;

(h) where however the invalidity or encroachment or unconstitutionality is clear, the court is bound to carry out its duty under the Federal Constitution to strike down or sever the impugned statutory provision or statute. The function of the court in this context is to ensure that the other organs of the government do not overstep or overreach their functions so as to contravene the fundamental liberties in Part II of the FC. The Federal Constitution strikes at any arbitrariness or capriciousness of State action, so as to ensure fairness. The action of the Legislature should ensure that it is based on valid and relevant principles applicable alike to all similarly situated, and not guided by extraneous and irrelevant considerations;

(i) in economic and fiscal matters such as tax measures the court should proceed warily or with restraint as the Judiciary is not expert in these matters. The State should therefore generally be left with wide latitude in designing and implementing modes of imposing fiscal regulatory measures and the court should not, unless compelled by the Federal Constitution, encroach into this field. However, where such measures are shockingly arbitrary, clearly illegal or unconstitutional, the court should act under art 4(1) of the FC (see *M/S Bajaj Hindustan Ltd v Sir Shadi Lal Enterprises Ltd* (2011) 1 SCC 640 at pp 655–656); and

(j) the principle of judicial restraint applied to taxing statutes emphasises the significance of taxation, which extends beyond its role as a means of generating revenue for government expenditures. Taxation also serves as a mechanism to address economic and societal disparities, aiming to mitigate inequalities within society.

A APPLICATION OF THE CONSTITUTIONAL PRINCIPLES ABOVE TO THE PRESENT CASE

Limb (a): What is the scope and ambit of the constitutional provision in issue?

B **[33]** When we apply the foregoing process or test to the present facts, the first question that arises for consideration is the full scope and ambit of the constitutional provision in issue. In relation to the instant questions, namely questions 1, 2 and 4, the appellants have made reference to art 121 of the FC, meaning that they maintain that judicial power as contained in art 121 of the C FC has been encroached or abrogated.

What is judicial power?

[34] We return to the age-old question of what judicial power means. The D oft-cited definition by CJ Griffith in *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330, a decision from Australia, is usually relied upon as a definition of the term:

> ... I am of the opinion that the words 'judicial power' as used in s 71 of the E Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

F

[35] This was affirmed for taxation matters in the Privy Council decision of *Shell Company of Australia, Limited v Federal Commissioner of Taxation* [1931] AC 275 at pp 295–296 ('Shell'), as pointed out by the appellants.

G **[36]** It is notable that in *Shell* the Privy Council concluded that the Board of Review was held to be exercising an administrative function in reviewing the assessment by a Commissioner, rather than judicial powers. The Privy Council negatived the proposition that the Board of Review was exercising judicial powers. A parallel may be drawn with the SCIT under the ITA — a body that H is 'not a court stricto sensu' (see Andrew Chew Peng Hui, *Tax Appeals in Malaysia: Law and Procedure* (Malaysia: Thomsom Reuters, 2021) at p 12) but an inferior tribunal (see *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, intervener) and another appeal* [1994] 2 MLJ 601 at p 610; [1994] 2 CLJ 705 at p 713).

I

[37] Coming back to the issue at hand, *judicial power refers to the independent power granted to, or vested in the courts, by the Federal Constitution*.

[38] There are several facets to judicial power. Article 4(1) of the FC confers

the right of constitutional judicial review to the Judiciary to ensure that the provisions of the Federal Constitution, which are supreme, are not contravened by the Legislature or the Executive arms of government. This is the hallmark of a jurisdiction that practices constitutional supremacy.

[39] This means that the Judiciary is conferred the power to ensure that the Legislative and Executive arms of the government do not encroach beyond the scope of their individual powers under the provisions of the Federal Constitution, as they subsist. This ensures the doctrine of the separation of powers is adhered to. The Judiciary is the guardian of the Federal Constitution in a jurisdiction such as ours which practices constitutional supremacy.

[40] Separately, judicial power also refers to and encompasses the power of the Judiciary to hear and determine the subject matter of actual controversies between parties to a suit, to deliberate upon and entertain that suit and finally determine or adjudicate on that dispute by handing down a binding decision on the same, through the hierarchy of our courts.

[41] The other aspect of judicial power which requires mention is that in this jurisdiction the long-raging debate on whether the 1988 amendment to the Federal Constitution in relation to the vesting of judicial power effectively abrogated the judicial power of the courts, has been settled by the construction of judicial power as subsisting in both arts 4(1) and 121 of the FC (see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145, *Semenyih Jaya*, *Zaidi bin Kanapiah*, *SIS Forum* and *Dhinesh a/l Tanaphll*).

[42] The latter provision by delineating or describing the jurisdiction of the High Court does not abrogate judicial power because such power is also vested in art 4(1) of the FC which allows the High Court and the superior courts to strike down legislation passed by Parliament where it does not conform to the Federal Constitution. Such striking out would be impermissible or impossible if indeed judicial power was not vested in the superior courts. Therefore the lack of the words 'judicial power shall be vested in two High Courts ...' does not abrogate judicial power nor the extent of such judicial power, as borne out by the continuing exercise of judicial power vide the inherent jurisdiction of the courts.

[43] This brings to the fore the distinction between judicial power and jurisdiction. Judicial power is vested in the Federal Court and the superior courts. The inferior courts or subordinate courts created by federal law acquire judicial power (to a limited extent), only as prescribed by federal law.

[44] Jurisdiction in relation to the superior courts, refers to the delineation

A conferred by Parliament and accepted by the courts to facilitate or enable their exercise of judicial power. It should be said that the Federal Court enjoys some degree of original jurisdiction. In this jurisdiction, the Courts of Judicature Act 1964 is the legislation by Parliament facilitating the exercise of judicial power by the courts. Thus, except for the original jurisdiction of the Federal Court, B which flows directly from the Federal Constitution, two prerequisites to jurisdiction must be present: first, the Constitution must have given the courts the capacity to receive it, and, second, an act of Parliament must have conferred it.

C

[45] Having deliberated on the meaning of the constitutional provision which is asserted to have been infringed or encroached upon, it is evident that the facet of judicial power being referred to by the appellants is the power of the Judiciary to hear and determine the subject matter of actual controversies between parties to a suit, to deliberate upon and entertain that suit and finally D determine or adjudicate on that dispute by handing down a binding decision on the same, through the hierarchy of our courts.

[46] And the controversy in issue here is the claimed abrogation or E suspension of judicial power by reason of s 106(3) of the ITA, when the judicial power of the courts to hear and determine all the defences available to a taxpayer when the Inland Revenue exercises its powers of recovery and collection, are curtailed in several aspects.

F **[47]** Having determined the scope and ambit of the constitutional provision in issue, namely the scope and ambit of judicial power under arts 4(1) and 121 of the FC, we proceed to consider limb (b).

Limb (b): What is the substance and effect of s 106(3) of the ITA on its true G *construction?*

[48] In determining this question, it will first be necessary to ascertain *whether s 106(3) of the ITA is to be construed in vacuo or in the context, purpose and object of the ITA as a whole.*

H

[49] The appellants effectively postulate that the section should be construed *in vacuo*. This is borne out in the appellants' submissions (and those of the *amicus curiae*), as throughout their submissions, the appellants (and *amicus*) have concentrated their arguments purely on s 106(3) of the ITA I without once attempting to construe the sub-section in the context of s 106 of the ITA itself or the Act as a whole. The entirety of the argument on the alleged usurpation of judicial power focuses on s 106(3) of the ITA. It is contended by the appellants as stated earlier, that a literal application of s 106(3) of the ITA would effectively amount to the decision of the Inland Revenue 'usurping' the

High Court of its judicial power to effectively determine disputes.

[50] However, such an approach which focuses wholly on the sub-section alone is likely to result in a construction which is different from an approach where the sub-section is read in the context of the section it is housed in, and the operation of the ITA as a whole. Moreover, the latter approach is the generally accepted mode of statutory construction approved by most jurisdictions.

[51] Secondly, the ITA does not comprise s 106(3) of the ITA alone. That provision must be read together with the other provisions of the Act including s 99(1) of the same. Section 99(1) of the ITA provides for a right of appeal against an assessment by an aggrieved person, to the SCIT.

[52] And the existence of the appeal procedure in s 99(1) of the ITA does not preclude or oust the right of judicial review against the determination of a statutory tribunal, namely the SCIT. In other words a construction of s 106(3) of the ITA in the context of the entirety of Act gives a more accurate picture of whether judicial power or function is removed or suspended for the purposes of constitutional review.

[53] Apart from s 17A of the Interpretation Acts 1948 and 1967, this position in relation to the construction of a statute is borne out by case law. As started earlier, a complete understanding of the words in a statute and the legislative intention for its enactment can only be achieved by carefully examining the entire document and all its components (see *BNCB v Babubhai* (1987) 1 SCC 606 (para 4)). In *Canada Sugar Refining Company Limited v The Queen* [1898] AC 735, it was said at p 741 that:

> Every clause of a statute should be construed with reference to the context and other clause of the Act, so as, as far as possible, to make consistent enactment of the whole statute.

[54] A similar view was espoused by this court in *Perbadanan Pengurusan Sunrise Garden Kondominium v Sunway City (Penang) Sdn Bhd & Ors and another appeal* [2023] 2 MLJ 621 (in the context of the Town and Country Planning Act 1976 ('the TCPA')):

> [141] As such s 4(5) of the TCPA must not be read *in vacuo*, as this would lead to an unnatural meaning and would fail to give effect to the true purport and meaning of this section as envisioned by Parliament. In line with the purposive interpretation of statutes and the aim of giving effect to legislative intent, *provisions should be interpreted holistically and should not, as far as possible, be interpreted in a way that would contravene other provisions in the Act*. The Act must be read holistically and its provisions read harmoniously. This was expressly provided in s 4(5) of the TCPA itself. For instance, *a provision cannot be interpreted such that it would result in*

effectively negating the application of another provision. A provision cannot be used to fetter the legislative intent in enacting other provisions of the Act and the purport of the Act as a whole.

[55] Following on from the legal reasoning above, it follows that the evaluation of the *constitutional validity of s 106(3) of the ITA necessitates an understanding of the rationale behind the enactment of the ITA. This in turn means that the effect of s 106(3) of the ITA within the statute has to be studied as a whole, as opposed to a construction of the section in vacuo.*

[56] In order to ascertain the purpose and object of the ITA it is appropriate to consider the legislative history of the ITA.

THE LEGISLATIVE HISTORY OF THE ITA 1967

[57] The income tax regime in our country was introduced in 1948 under the British colonial era. It was introduced to legitimise the collection of taxes from individuals and corporations. The first income tax legislation introduced in Malaya was the Income Tax Ordinance 1947. This Ordinance was substantially based on the Model Colonial Territories Income Tax Ordinance 1922 (United Kingdom) (see Kasipillai J, *A Comprehensive Guide to Malaysian Taxation* (McGraw-Hill: Malaysia, 2005)). Following the formation of Malaysia in 1963, the Income Tax Ordinance 1947 was repealed and replaced by the ITA 1967, which came into effect on 1 January 1968. The ITA 1967 consolidated the Income Tax Ordinance 1947, the Sabah Income Tax Ordinance 1956 and the Sarawak Inland Revenue Ordinance 1960.

[58] Significantly, the ITA provided for the formation of the SCIT to hear appeals against income tax assessments. This was explained by the then Finance Minister, Tun Tan Siew Sin during the second reading of the Income Tax Bill at the *Dewan Rakyat*:

> Appeals against assessments to the Board of Review in West Malaysia and Sabah and to the Commissioner of Inland Revenue in Sarawak will be discontinued with the appointment of Special Commissioners. The appointments will be made by the Yang di-Pertuan Agong and it is intended that at least one of any two Special Commissioners hearing an appeal should be a person with legal or judicial qualifications. *Adequate safeguards for the interests of taxpayers are provided in the Bill through a right of appeal to the High Court and, if necessary, to the Federal Court. The new procedure, it is hoped, will expedite the disposal of appeals against assessments to the mutual advantage of both the appellant and the Government.* (Parliamentary Debates of House of Representatives (Fourth Session of the Second Parliament of Malaysia, 24 August 1967) Vol IV, No 11, 2259–2260).

[59] The then Finance Minister further emphasised the aim of the

Government to combat tax evasion through the proposed Bill:

> Honourable Members will have observed that the penalty provisions in this Bill in certain respects are more severe than those in the existing Ordinances. The justification for these enhanced penalties is that *it is the duty of the Government to ensure that the income tax laws of the country are fully enforced in the interests of the general body of taxpayers who would otherwise have to bear a disproportionately heavier tax burden through no fault of their own.* These penalties are necessary as a deterrent to would-be tax evaders or those who deliberately delay submission of returns of income or omit or understate their income. It is considered that the Government should not condone the sins of those who do not accept their obligations to the country. The honest taxpayer need have no qualms about these penal provisions since there is provision in the Bill to abate or remit the penalties where circumstances warrant such abatement or remission.
>
> *In the face of persistent and widespread evasion or attempts at evasion of tax, and in view of the inadequacy and shortcomings of existing legislation to prevent avoidance of tax,* it is considered necessary to give wider powers to the Department of Inland Revenue. Taking into consideration that there are approximately 213,500 individuals in Malaysia paying income tax out of a population of nearly 10 million and the average reported income of a businessman is only $3,600 per annum, it should be obvious to all and sundry that *evasion and avoidance of tax are manifestly rife in this country.* These additional powers are, therefore, necessary and will be used with circumspection and fairness by the Inland Revenue Department. I am sure that every honest citizen will support the Government in its fight against tax evasion and the prevention of tax avoidance (Parliamentary Debates of House of Representatives (Fourth Session of the Second Parliament of Malaysia, 24 August 1967) Vol IV, No 11, 2260–2261).

[60] The philosophy behind the introduction of the requirement for payment of tax, notwithstanding any appeal lodged by the taxpayer, was explained by the then Finance Minister during the second reading of the Income Tax (Amendment) Bill at the *Dewan Rakyat*:

> Broadly speaking, the collection of tax on any assessment cannot proceed so long as there is a valid objection or appeal against the assessment. *In many cases, however, taxpayers lodge an objection or appeal merely to delay the payment of the tax. Even one of the strongest critics of this Bill, a lawyer, who wrote a letter to me, admits that the present Section 81 'did give rise to a number of appeals which were brought purely as a matter of delaying tactics', to use his exact words. I can assure the House that even in the past many of these appeals were frivolous. In the future, assuming that our anti-evasion drive is successful, the number of such appeals will rise steeply and without the provision proposed, the Department would be swamped with an unmanageable list of appeals which would take many years to settle. It is obvious that the more successful the drive, the greater the number of appeals, and hence it would be impossible in practice to deter evaders without this provision. Thus, in cases where the tax is substantial, it has been found that taxpayers have deliberately delayed the settlement of their appeals in order to have the use of the money which should have been paid as tax. Clause 10 now requires that the tax charged in any assessment may have to be paid, regardless of any objection or*

A *appeal against the assessment.* It is not intended, however, that payment of the full amount of the tax shall be demanded in every case where an objection or appeal is lodged. The Comptroller is given discretion to extend the period within which payment of tax may be made in any particular case, and Hon'ble Members may be assured that he will exercise his discretion in a reasonable and responsible manner. Where, for example, it is necessary for the Comptroller to make a protective additional assessment in any case where the 12-year limit in Clause 8 is about to expire, he will not necessarily demand payment of the full amount of the tax in question if the taxpayer and his agent are genuinely co-operating in an effort to bring out the full facts of the case. Similarly, the provisions of Clause 10 will not normally be applied to employees who will, as at present, be able to pay their tax out of their remuneration over the whole of the year of assessment, or within such further period as the Comptroller may determine. In view of the fact that we are now half-way through the year, Government takes the view that the date '1st July, 1960' in proviso (a) should be amended to read '1st September, 1 960', as in the case of Clause 6. This amendment will obviate any hardship in meeting the tax due on assessments made prior to 1st January, 1960. This clause, again, is not novel and is based on a similar provision which has been in force in Australia, New Zealand and several other countries for many years (Parliamentary Debates of House of Representatives (Second Session of the First Parliament of Malaysia, 20 June 1960) Vol II, N1086–1086).

[61] It is clear therefore that the present incarnation of our ITA was enacted by the Legislature to facilitate the expeditious collection of government revenue and to deter tactical attempts from would-be tax evaders to delay the payment of outstanding taxes.

[62] At first blush, s 106(3) of the ITA, taken literally, appears to prohibit the court from taking into account allegedly wrongful computations of tax or the fact that the impugned amount is the subject of appeal.

[63] The appellants argue that this restriction of available defences 'ousts' judicial power and renders the section unconstitutional.

[64] As we have concluded earlier, this narrow consideration of the section is insufficient to enable this court to ascertain the true intent and purpose of the section and the Act as a whole.

[65] As stated earlier, the ITA does not comprise s 106(3) alone. That provision must be read together with the other provisions of the Act, for example s 106 in its entirety, as well as the provisions of ss 103–107 which fall within Part VII of the ITA entitled 'Collection and Recovery of Tax'.

[66] Section 106(1) states:

Tax due and payable may be recovered by the Government by civil proceedings *as a*

debt due to the Government. (Emphasis added.)

[67] The provisions in ss 103 and 106 enable the Inland Revenue to ensure recovery of the tax assessed to be due by declaring it a statutory debt, or a debt due under s 106 of the ITA for purposes of collection and recovery only. This is unlike a contractual debt arising from a loan or financing etc.

[68] In essence, under the system promulgated by Parliament for the recovery and collection under Part VII of the ITA, once the tax is assessed by the DGIR, it has to be paid within a time fixed under the statute. If the taxpayer does not pay, the assessed sum becomes a 'debt' by virtue of s 106 for purposes of recovery only. If the sum assessed to be a debt pursuant to s 106(1) is not paid, then the Inland Revenue may initiate recovery proceedings to ensure collection of the debt.

[69] In recovery proceedings, s 106(3) comes into play. It expressly obviates certain pleas or 'defences' to the recovery of the debt under s 106(1) by providing that:

> (3) In any proceedings *under this section* the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under subsections 106(3), (5) or (7).

[70] This in turn begs the question why such recovery proceedings of the tax assessed, restrict the defences available to the taxpayer. An answer may be gleaned from the manner in which the issues of collection and recovery are dealt with separately from the resolution of disputes relating to tax matters.

[71] The collection and recovery procedure under Part VII of the ITA is distinct from the disputes procedure which enables taxpayers to challenge assessments under Part VI. Under Part VI, the taxpayer exercises his right of challenge or objection under s 99(1) of the ITA and the subsequent relevant provisions, for example in Schedule 5.

[72] A taxpayer's right of appeal is set out in s 99(1) of the ITA. It is therefore apparent that any person aggrieved with an assessment is to appeal to the SCIT against the assessment by the DGIR within thirty days after the service of the notice of assessment.

[73] From a construction of the ITA at ss 103–107 for example, it is evident that *these statutory provisions fall under the Chapter related to Collection and Recovery under Part VII* of the statute.

[74] Section 103B of the ITA provides for recovery of the sum assessed to be

due by the DGIR under Part VII, notwithstanding the institution of proceedings under any other part of the Act or under any other law. This allows for recovery pending the taxpayer's dispute or challenge on the basis or quantum of the sum so assessed.

[75] And in like vein s 106(3) of the ITA restricts or narrows the scope of defending the statutory claim for recovery under s 106 of the ITA in view of the other provisions in the ITA allowing for disputes to be brought as established under the Act.

[76] When the general scheme of the Act is looked at, it becomes apparent that the ITA provides for a mode of resolution of a taxpayer's dispute by way of appeal to the SCIT under s 99(1) of the ITA which provides:

> *A person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment* by giving to the Director General within 30 days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) *a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.*

[77] Section 99(1) provides for a reference of the dispute to the SCIT who are qualified to deal with tax issues, more particularly the basis for assessment, the quantum for assessment, the computation of assessment, the liability for assessment under the ITA etc.

[78] However, prior to the hearing of such an appeal under s 99(1) of the ITA, s 101(1) of the ITA requires the DGIR to review the assessment against which the appeal is made prior to referring the matter to the SCIT, under s 99(1) of the ITA.

[79] If the review is unsuccessful in the sense that no agreement is reached between the DGIR and the taxpayer as to the basis for assessment or quantum of liability, only then is the matter referred for adjudication to the SCIT under s 99(1).

[80] Proceedings under the SCIT are dealt with *under* s 102(4) *which in turn refers to Schedule 5. Schedule 5 sets out the mode of procedure and how the SCIT hears and adjudicates on the matter*. The SCIT after hearing the appeal deliberates on the same and hands down a decision in the form of a deciding order. This deciding order at para 23 to Schedule 5 is stated to be final. However, a right of appeal lies from the SCIT to the High Court on questions of law under para 34. Appeals lie from the High Court to the Court of Appeal

and the Federal Court as provided under para 42.

[81] It is therefore apparent from the design and operation of the ITA that Parliament has fashioned a specific mode of determination of disputes relating to assessment of liability for tax. And that mode of doing so, is by the DGIR, followed by the specialist SCIT. There is express provision for an appeal to the superior courts in para 34 of Schedule 5 to s 102 of the ITA.

[82] A right of administrative judicial review also subsists, as such a right of administrative review lies against the decisions of all inferior tribunals because the courts enjoy supervisory judicial powers to do so as explained earlier above. This power is recognised and delineated under the Courts of Judicature Act 1964, Schedule to s 25.

[83] A right of constitutional judicial review under art 4(1) of the FC also lies where it is contended that a provision of the Act is unconstitutional, as is the case here.

[84] The provisions in ss 103–106 of the ITA, and in particular s 106 of the ITA *in toto*, relate to the *immediate collection and recovery of tax assessed to be due by the DGIR within a 'pay first dispute later' system*. On the other hand, objections to, or appeals against the veracity of the sum assessed to be due, are adjudicated on the basis of the system prescribed under s 99(1) of the ITA under Part VI, Chapter 2 entitled 'Appeals'. This means, in effect, that even if adjudication is delayed on the ultimate liability of the taxpayer of the sum assessed to be due, *immediate payment of the sum is NOT deferred.*

[85] Any errors in the sum so assessed to be due will be refunded to the taxpayer under s 111 of the ITA, after the full process of adjudication prescribed for objections and appeals in Chapter 2 and Schedule 5 is undertaken.

[86] Put another way, adjudication of the merits of an assessment fall to be considered by the SCIT under s 99(1) of the ITA with recourse to the superior courts by way of appeal. However, for purposes of immediate collection and recovery of sums assessed to be due by the DGIR, recourse is made to the courts under s 106 of the ITA supported by s 142(1) of the ITA and s 103B of the ITA to give effect to the 'Pay first dispute later' scheme and operation of the ITA.

[87] The court under s 106 of the ITA is fulfilling the purpose of recovery or collection only. *It is not undertaking a full judicial adjudicatory role. Its full adjudicatory judicial power is deferred to the appeal arising from the decision of the SCIT by way of questions of law, or administrative or constitutional judicial review at a subsequent stage.*

[88] And this is consonant with the 'Pay first dispute later' mode of tax imposition by the Government. There is no abrogation or suspension of the court's adjudicatory powers because those powers remain to be exercised in the course of the appeal proceedings brought in relation to the assessment itself. The judicial powers of judicial review as well as powers of judicial intervention in the form of a stay are also available and not ousted.

[89] In short, s 106(3) of the ITA cannot be viewed as abrogating, suspending or removing judicial powers because the court is only facilitating collection and recovery under the ITA. It is not exercising its full judicial powers of hearing, adjudication or determination which arise under the dispute adjudication system stipulated in Part VI, Section 2, Appeals under the ITA. The preclusion of issues relating to the quantum of tax payable or the basis of imposition of tax or whether a person is a 'chargeable' person or not are all matters that fall for consideration under the appeals procedure.

[90] This is borne out by the *characterisation of the quantum of assessment* (falling due after issuance by the DGIR and expiry of the time period given to make payment) *as a 'debt' under s 106(1)*. This means that *the sum assessed becomes a 'debt' due under the ITA, which is recoverable in civil proceedings.*

[91] This statutory certification of the sum assessed as a debt means that the sum so certified is statutorily due and payable. However, it is equally clear from a perusal of the ITA as a whole, that *it is not a final determination of the sum due and owing by the taxpayer because s 99(1) of the ITA remains untouched and enables the taxpayer to proceed with his grievances through the SCIT and the entire hierarchy of the courts.* It follows that the *sum adjudged to be due under s 106 is to facilitate the collection and recovery of the sum assessed under the 'Pay first, dispute later' system.*

[92] This mode of construction of s 106 of the ITA is the preferred and correct construction for yet another reason. It is not open to a court to adjudicate on the same debt twice. If indeed the s 106 of the ITA proceedings are subject to the same level and form of judicial scrutiny as the appeal from the SCIT or judicial review, then res judicata and issue estoppel would bite, precluding the determination by the SCIT of the dispute under s 99(1) of the ITA and the subsequent right of appeal conferred by Parliament to the superior courts. Judicial review may also be foreclosed. This in itself provides a coherent basis for explanation as to why s 106(3) of the ITA restricts the areas that the court may scrutinise in a s 106 of the ITA recovery proceeding.

[93] If s 106 of the ITA were construed in a fashion so as to allow the taxpayer to challenge proceedings under that provision by raising certain defences *both* at court and before the SCIT, it could give rise to inconsistent

decisions by the court and the SCIT. As astutely observed by Edgar Joseph Jr FCJ in *Dato' Hj Ghani Gilong*:

> If counsel for the taxpayer were correct in his contention that the plea of limitation based on sub-ss 1 and 3 of s 91 of the Act is available to him in proceedings for recovery of tax brought in court as well as in proceedings before the Special Commissioners, then *a decision by the High Court on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by the decision of the High Court* thereby abdicating their fact-finding function of determining whether there has been fraud or wilful default within the meaning of sub-s 3(a) of s 91 of the Act. Alternatively, even *if the Special Commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the identical question of limitation.*

[94] It is also pertinent to comprehend that the s 106 of the ITA statutory characterisation of the sum assessed by the DGIR to be due and payable '*under this Part*' does not give rise to a final judgment. It provides for an enforcement or recovery mechanism to meet the needs of collecting the sum due from the taxpayer first, while allowing adjudication of the debt on its merits to follow later. All this is in keeping with the 'Pay first, dispute later' system embedded in the ITA.

[95] This construction is supported by the existence of s 99(1) of the ITA, the appeals procedure, which relates to a full adjudication of the sum assessed to be due and payable by the DGIR. Judicial power is thus preserved in the ITA for adjudication of the taxpayer's dispute, notwithstanding an earlier collection mechanism. When this is considered in conjunction with the subsisting supervisory judicial powers of the court, as well as the statutory entitlement of the taxpayer to a refund of any sum erroneously claimed or assessed, it follows that it cannot be said that judicial powers are abrogated or removed. Dispute resolution is simply deferred to enable collection first. In other words, the statutory 'judgment' created under s 106 of the ITA does not possess the character of a final judgment obtained after a full adjudication of the tax assessed to be due by the DGIR.

[96] We have stated earlier that the purpose of the ITA as outlined in the Hansard is to ensure that there is full and speedy settlement of tax debts and that recalcitrant taxpayers do not utilise objections and the appeal procedure to defer payment of their taxes indefinitely. It is in the public interest that taxes are collected expeditiously and this is a relevant factor for the court to take into account. The fact that the words 'public interest' are not literally utilised in either the ITA or the Federal Constitution does not mean that public interest is of no relevance. The Federal Constitution subsists in, and for, the public interest and the nation as a whole. The 'Pay first, dispute later' system certainly

serves the public interest in terms of the fiscal needs of the public and the nation as a whole.

OTHER JURISDICTIONS

[97] The constitutionality of the 'Pay first, dispute later' system has been considered in other jurisdictions, directly and indirectly.

Constitutional Court of South AfricaMetcash Trading Limited v Commissioner for the South African Revenue Service and another (CCT3/00) ('Metcash')

[98] In *Metcash*, the primary issue before the Constitutional Court of South Africa was whether ss 36(1), 40(2)(a) and (5) of the South African Value-Added Tax Act 89 of 1991 ('the VAT 1991') were *unconstitutional for limiting the right of access to courts protected by* s 34 of the South Africa Constitution *('the SA Constitution').*

[99] Section 36(1) of the VAT 1991 in essence provided that *payment of an assessment was not suspended by any appeal or pending the decision of a court of law.* This provision evidenced the utilisation of the 'Pay first dispute later' system of tax collection, which is similar to ours. Their provisions in Part V of the VAT 1991 are analogous to our *Part VII namely ss 103–106 of the ITA*, which do not allow for a suspension of payment of the assessment due pending appeal or the institution of any other action (see ss 103(1), 103B and 106 of the ITA) (unless an exemption is granted by the DGIR).

[100] *Section 40(2)(a)* of VAT 1991 empowered (these tax provisions were repealed after the case and replaced by the Tax Administration Act with new provisions) the Commissioner (equivalent to our DGIR) to enforce payment by *filing a statement with a court which acts as a civil judgment* in the following terms:

> 40 Recovery of tax.
>
> (2)(a) *If any person fails to pay any tax, additional tax, penalty or interest payable in terms of this Act*, when it becomes due or is payable by him, *the Commissioner may file with the clerk or registrar of any competent court a statement certified by him as correct and setting forth the amount thereof so due or payable* by that person, and *such statement shall thereupon have all the effects of, and any proceedings may be taken thereon as if it were, a civil judgment lawfully given in that court in favour of the Commissioner for a liquid debt* of the amount specified in the statement. (Emphasis added.)

[101] *Section 40(5) of the VAT 1991*, which is closely analogous to our s 106(3), puts the correctness of the assessment beyond challenge in such proceedings. It stipulates:

(5) It shall not be competent for any person in proceedings in connection with any statement filed in terms of subsection (2)(a) to question the correctness of any assessment upon which such statement is based, notwithstanding that objection and appeal may have been lodged against such assessment.

[102] The salient facts of the case are that an assessment of R266m was issued to Metcash by the Commissioner under the statute. Metcash objected to the assessment, but the Commissioner rejected the objection and required Metcash to make payment within 48 hours. Failure to pay would have led to the Commissioner implementing the summary procedure of filing a certificate in terms envisaged under s 40(2)(a) such that it would have the effect of a judgment.

[103] Metcash, in response, approached the High Court on an urgent basis. The judge of first instance found that ss 36(1), 40(2)(a) and 40(5) of the VAT 1991 were invalid by reason of their effective infringement of s 34 of the SA Constitution which guaranteed access to justice. And this was because the courts could not suspend the obligation to pay, while the Commissioner could. To that extent the judge concluded that these provisions excluded the power of a court of law to provide an aggrieved vendor with interlocutory relief irrespective of the merit or demerits of his case.

[104] On appeal, the Constitutional Court of South Africa reversed the High Court and held that ss 36(1), 40(2)(a) and 40(5) of the Act *did not infringe the constitutionally protected right of access to the courts and did not oust the jurisdiction of the courts.* The court dealt with each of these provisions in turn.

[105] With respect to *s 36(1)* which held that *the payment of an assessment is not suspended by an appeal* under the VAT 1991 or the decision of a court of law, the Constitutional Court did not construe s 36(1) *in vacuo*, but considered its purpose in the context of Part V of their statute, which related to objections and appeals against the assessment by the Commissioner. It held that Part V which allowed, inter alia, for proceedings before a 'Special Court or Board' and the subsequent resort to a court of law by way of an appeal, amounted to a statutory mechanism specially created for this type of administrative decision undertaken by a specialist panel.

[106] Secondly it held that s 36(1) had to be looked at in its textual context and its plain wording which sought to serve 'two separate but related objectives':

(a) to ensure that the disgruntled taxpayer paid their taxes and did not delay the same by pursuing remedies under Part V of their Act; and

(b) refunds for incorrect assessments would be made later.

[107] It was in that context that the amount assessed could not be suspended by appeal or any other pending decision of a court of law. The common law practice of a suspension of execution by virtue of an appeal did not apply to the appellate procedure created under the VAT 1991. It could not of itself have the effect of suspending payment. It was concluded that the non-suspension of the obligation to pay pending appeal only concerned the obligation of the taxpayer to pay first, notwithstanding demur, the assessed VAT chargeable under their statute.

[108] It was further concluded that the refusal by the Commissioner to grant relief under s 36(1) could be subject to judicial intervention in certain circumstances. Therefore the fact that there was a relegation of the specialist subject matter to a special court did not in itself oust the jurisdiction of the courts. Moreover the court considered that judicial review was not ousted.

[109] Reverting to our case, in like manner, the provision for the specialist SCIT comprising a tribunal to deal with the objections and challenges of a taxpayer, cannot be said to amount to an ouster of the judicial power of a court. The Act merely designates an independent and impartial tribunal to deal with the disputed tax case. The fact that there is a right of appeal to the entire hierarchy of the court system further puts paid to any contention that judicial power is ousted.

[110] As for the treatment of a certified document of the sum assessed to be due by the Commissioner as a civil judgment, the Constitutional Court found that contrary to ousting the courts, the entire procedure requires the intervention of the court officials and legal rules and procedures relating to execution. It was held that it sets in train the execution process of the particular court under the ordinary civil process. So it cannot be said that judicial power is ousted.

[111] *Again when compared to the statutory mechanism for recovery and collection under the ITA in this jurisdiction, it is clear that contrary to ousting the jurisdiction of the courts, the courts are utilised to enable execution and recovery, in keeping with the need to collect tax first and dispute later.*

[112] Finally, as for s 40(5) which is analogous to our s 106(3) of the ITA, the South African Constitutional Court held that while it limited the basis on which an assessment could be challenged it did not prohibit litigation. Nowhere is the word 'ouster' utilised in the language of the sub-section.

[113] In like manner there is nothing in s 106(3) that expressly ousts the

judicial power or jurisdiction of the court. More importantly as held in *Metcash* the language of s 106(3) is narrowly focussed on the correctness of the assessment. While our section stipulates that the court shall not look at the correctness of the assessment, the then South African legislation precludes the taxpayer from questioning the correctness of the assessment. However, both achieve the same object in narrowing down the field of inquiry available to the taxpayer and the court, at this juncture of the entire taxation process.

[114] Additionally, similar to the situation in *Metcash*, defences other than those narrowly confined in s 106(3) of the ITA are left undisturbed by our Act. There may well be other procedural or substantive issues that can be utilised by the taxpayer in relation to the tax assessed to be due by the DGIR.

[115] Moreover, the effect of s 106(3) is temporary. It must be borne in mind that the scheme of the Act allows for the aggrieved taxpayer to have recourse to a fair judicial determination in the course of his dispute with the DGIR through the hearing and adjudication before the specialist SCIT and subsequently the courts. The judicial powers of review are not ousted. The DGIR retains wide powers to allow for payments by instalments, suspension and even exemption. Judicial intervention in terms of a stay is not ousted either.

[116] The fact that there are statutory safeguards for restitution or repayment if the assessed sum is found to be incorrect, ensures that the taxpayer is ensured of his entitlement to a full judicial dispute resolution hearing, such that judicial power is neither suspended nor abrogated.

[117] *Metcash* bears out the position in relation to our ITA that a system which is founded on a 'Pay first, dispute later' system, requires, as an essential part of the scheme, that payment is made first and liability deferred. To that extent the obligation to pay first as effected through ss 103, 103B and 106 of the ITA, provides for collection and recovery immediately upon assessment.

[118] However, the obligation to pay and the limitation of available objections pertaining to the correctness of the assessment are limited in scope and temporariness, as these issues remain available to be ventilated under s 99(1) and Schedule 5 of the ITA. Judicial review is also not abrogated. Judicial intervention in the form of a stay is not prohibited. To that extent, it cannot be said that judicial power is negated or ousted.

[119] In the context of the purpose and object of the Act, it bears reiterating that these provisions serve the public purpose in obtaining full and speedy settlement of tax debts.

[120] Another relevant authority is that of *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services and another; Kluh Investments (Pty) Ltd v Commissioner, South African Revenue Services and another* [2011] ZAWCHC 297 which deals with the South African Income Tax Act 58 of 1962. It was held there that the filing of a certified statement under s 40(5) of their statute did not have 'the rights determining character of a judicially delivered judgment'. Binns-Ward J further held:

> Although a statement filed by the Commissioner in terms of s 91(1)(b) has all the effects ie consequences of a judgment it is nevertheless not in itself a judgment in the ordinary sense. It does not determine any dispute or contest between the taxpayer and the Commissioner. It has the effect of a judgment however, in enabling the Commissioner to obtain a writ to attach and sell in execution the taxpayer's assets to exact payment of an amount that is payable.

[121] This statement, with respect, accurately reflects the nature of a s 106 of the ITA judgment obtained purely for the enforcement of an assessment by the DGIR. It is essential for the execution of the amount assessed to be due by the taxpayer under the 'pay first dispute later' system entrenched in our ITA.

Australia

[122] The relevant case is *Deputy Commissioner of Taxation v Buzadzic* [2019] VSCA 221.

[123] Here, the Deputy Commissioner of Taxation brought proceedings against Danny and Leisa Buzadzic ('the Buzadzics') seeking recovery of income tax for a nine-year period, including administrative penalties and interest charges.

[124] Similar to the instant appeals, the Commissioner sought summary judgment against the Buzadzics on the basis that they had no real prospect of success under s 61 of the Civil Procedure Act 2010 and r 22.03 of the Supreme Court (General Civil Procedure) Rules 2015.

[125] The Buzadzics challenged the constitutional validity of a number of statutory provisions. One was s 175 of the Income Tax Assessment Act 1936 (Cth) ('the 1936 Act') which states that:

> [t]he validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with ('the no invalidity provision').

[126] The other was s 350–10(1), item (2) of Sch 1 to the Taxation Administration Act 1953 (Cth) ('the TAA') which provides that:

> production of ... a notice of assessment under a taxation law; ... is conclusive

> evidence that ... (a) the assessment was properly made; and (b) except in proceedings under Part IVC of [the TAA] on a review or appeal relating to the assessment — the amounts and particulars of the assessment are correct ('the conclusive evidence provision').

[127] The Buzadzics also challenged the validity of s 14ZZM of the TAA which states:

> The fact that a review is pending in relation to a taxation decision does not in the meantime interfere with, or affect, the decision and any tax, additional tax or other amount may be recovered as if no review were pending.

[128] In summary, the Buzadzics argued that these provisions were contrary to the Constitution of the Commonwealth because they require the Supreme Court of Victoria to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power and they confer upon the taxing authority part of the judicial power of the Commonwealth, and further that those provisions operate to deny the defendant all rights to resist the pleaded assessments by proving in the Supreme Court of Victoria that the criteria of pleaded liability are not satisfied.

[129] The applications for summary judgment were dismissed by a judge in the trial division on the basis that, if the provisions of the 1936 Act which the Commissioner relied on had the operation for which the Commissioner contended, they would 'impermissibly confer judicial power' on the Commissioner and 'require the Court to act in a manner inconsistent with its position as a repository of federal judicial power'.

[130] On appeal, the Court of Appeal of Victoria observed that the prospect of provisions operating in a harsh manner has long been acknowledged as reflective of a 'legislative policy to protect the revenue against the prospect of taxpayers withholding payment and spending the proceeds on speculative appeals' and further held that *the availability of review and appeal proceedings was fatal to the Buzadzics' argument that the impugned provisions imposed an incontestable tax.*

[131] In relation to the recovery proceedings, the Court of Appeal of Victoria observed that:

> [91] ... the court must be satisfied of a number of matters before finding that an amount is due and payable. It must determine that the correct parties are before it and, based on relevant assessments, whether there is a tax-related liability and the amount of such a liability. It may also need to consider a prima facie certificate under s 255–45 of sch 1 to the TAA, under which issues of valid service and the amount outstanding may be addressed ... the fact that some or all of the matters in

issue may readily be determined because of the ease of their proof does not deprive the process of its judicial character.

[132] The Court of Appeal of Victoria further held that:

> [95] The rule of law is satisfied, not only because the court applies the law to the question whether the statutory debt is established in a particular case, but also because there is elsewhere provided full opportunity for challenging the underlying assessment by way of review or appeal.
>
> [98] ... The assessment is not an exercise of judicial power. *It provides the foundation for the creation of a statutory cause of action and the court exercises judicial power to decide whether the conditions for the creation of that cause of action have been established.*

Hong Kong

[133] Next, in *The Commissioner of Inland Revenue v Shelcore Hong Kong Limited* [2011] HKCU 143, the issue confronting the Hong Kong District Court was whether s 75 of the Inland Revenue Ordinance ('the IRO') curtailed the court's judicial power to hear defences against incorrect or excessive tax assessments in contravention of art 35 of the Basic Law ('the BL') and arts 10 and 22 of the Bill of Rights Ordinance ('the BORO').

[134] Section 75 of the IRO is not in pari materia with s 106(3) of the ITA, but it is substantially similar in effect. It reads as follows:

> (1) Tax due and payable under this Ordinance shall be recoverable as a civil debt due to the Government.
>
> (2) Whenever any person makes default in payment of tax the Commissioner may recover the same by action in the District Court notwithstanding that the amount is in excess of the sum mentioned in section 33 of the District Court Ordinance (Cap 336).
>
> (3) ...
>
> (4) *In proceedings under this section for the recovery of tax the court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal,* but nothing in this subsection shall be construed so as to derogate from the powers conferred by the proviso to section 51(4B)(a) to give judgment for a less sum in the case of proceedings for the penalty specified therein.

[135] The Hong Kong District Court held that the fact that the adjudicating tribunal's decision was subject to subsequent judicial control meant that there was no violation of the Basic Law and the BORO.

[136] The District Court further held that revenue law is a specialised area of law, wherein the Board of Review is a quasi-judicial tribunal established by law which is independent from the Commissioner of Inland Revenue. The judgment emphasised that taxpayers retain the right of access to court, where objection to the assessment is dealt with by the Board of Review and the High Court and objection to the tax is dealt with by the District Court.

Ghana

[137] In *Kwasi Afrifa v Ghana Revenue Authority (Reference No J6/02/2022)* [2022] DLSC 11868 ('Kwasi Afrifa'), the Supreme Court of Ghana had to consider the question of whether s 42(5) of the Revenue Administration Act 2016 (Act 915) *is inconsistent with and violates the constitutional right to administrative justice guaranteed under* art 23 of the Ghana Constitution 1992.

[138] The impugned s 42(5) states as follows:

> (5) An objection against a tax decision shall not be entertained unless the person has:
>
> (a) in the case of import duties and taxes, paid all outstanding taxes including the full amount of the tax in dispute; and
>
> (b) in the case of other taxes, paid all outstanding taxes including thirty percent of the tax in dispute.

[139] The Supreme Court of Ghana held that the provisions did not contravene the constitutional right to administrative justice under art 23 of the Ghana Constitution 1992.

[140] In doing so, the Ghanaian Supreme Court observed that *the structure of Act 915 which contains avenues for the taxpayer to challenge the decision of the tax authority such as empowering the Commissioner General to waive, vary or suspend the requirements of s 42(5) pending the determination of the objection or take any other action that the Commissioner General considers appropriate including the deposit of security, and allowing appeals to be made to the Tax Appeals Board, did not oust the jurisdiction of the court as such avenues did not preclude the taxpayer from exercising his constitutional right to seek redress for judicial review.*

[141] The Supreme Court of Ghana was faced with a similar question of law in the case of *Richard Amo-Hene v Ghana Revenue Authority & 2 Ors* [2022] DLSC 11872. The issue was whether:

(a) s 42(5)(b) of the Revenue Administration Act 2016 (Act 915) which requires a taxpayer to pay all outstanding taxes including 30% of the tax in dispute (in the case of other taxes) before an objection to a tax decision

A can be entertained by the Commissioner General; and

(b) O 54 r 4(1) of the High Court (Civil Procedure) Rules 2004 (C.I 47) which stipulated that the High Court will not entertain an appeal against a tax assessment unless the aggrieved person has paid 25% of the disputed tax in the first quarter of that year of assessment as contained in the notice of assessment violated the presumption of innocence and a person's right of access to the court guaranteed under arts 2(1), 17(1), 19(2)(c), 33(1), 33(5), 125(2), 130(1), 132, 133(1) and 140 of the Constitution of Ghana 1992.

C

[142] In answering this issue, the majority view adopted the reasoning from *Kwasi Afrifa,* holding that the presence of dispute resolution provisions under Act 915 subjecting tax decisions to objection, judicial review and appeal meant that the tax regime passed the test of constitutionality.

D

[143] From the foregoing we conclude that *neither s 106(3) nor the other subsections of ss 106 and 103 in its entirety, taken in the context of the ITA, have the effect of ousting, suspending, or abrogating judicial power.* On the contrary when read in context and purposively it allows for judicial intervention and E judicial process to take its full course.

[144] It bears repeating that the ITA allows for:

(a) an appeal process which subsequently leads to a full appeal before the F hierarchy of the Courts of Malaysia;

(b) the grant of a stay at the discretion of the courts exercising judicial power; and

(c) the right of judicial review which is not ousted by the ITA.

G

[145] Therefore it is only in relation to the immediate collection and recovery of tax due and payable under the ITA, that the court undertakes a recovery function in order to give effect to the purpose and object of the 'Pay first, dispute later' model of tax adopted in this jurisdiction. This cannot H amount to a negation, abrogation or suspension of judicial power which may be exercised in all the circumstances set out in (a), (b) and (c) above. It therefore follows that s 106(3) of the ITA passes the constitutional test and cannot be invalid or unconstitutional.

I **[146]** We further conclude that neither s 106(3) of the ITA nor the other subsections of ss 106 and 103 in its entirety, taken in the context of the ITA, have the effect of ousting, suspending, or abrogating judicial power. On the contrary when read in context and purposively it allows for judicial intervention and judicial process to take its full course, as we have explained at

length above. Judicial power under the Federal Constitution is left intact, and accordingly s 106(3) is not unconstitutional.

[147] Having analysed and considered the statutory provisions and scheme contained in the ITA we are in a position to answer questions 1, 2 and 4:

(a) question 1: whether s 106(3) of the Income Tax Act 1967 contravenes art 121 of the Federal Constitution?

answer: No, it does not contravene art 121 of the Federal Constitution;

(b) question 2: whether s 106(3) of the Income Tax Act 1967 is unconstitutional and/or ultra vires as it usurps the judicial power of this Honourable Court guaranteed by art 121 of the Federal Constitution?

answer: question 2 is effectively the same as question 1. The answer is that s 106(3) is not unconstitutional as it does not usurp the judicial power of the courts guaranteed by art 4(1) and art 121 of the Federal Constitution;

(c) question 4: whether art 121 of the Federal Constitution, which guarantees the judicial power of this Honourable Court, is relevant in the determination of civil recovery proceedings in tax matters (including in summary judgment proceedings therein)?

answer: Yes, art 121 of the Federal Constitution which relates to the existence and exercise of judicial power is relevant in the determination of civil recovery proceedings in tax matters. Judicial power is not ousted by the recovery proceedings initiated under ss 103 and 106 of the ITA which comprise Part VII of the Act and ensure recovery first prior to the full ventilation of the taxpayer's disputes in relation to the assessment of the DGIR. The determination or adjudication of such disputes are fully provided for in s 99(1) and Schedule 5 of the ITA as well as vide the powers of judicial review enjoyed by the courts.

OUR DELIBERATIONS AND ANALYSIS IN RELATION TO THE QUESTIONS OF LAW IN CATEGORY 2

[148] We now turn to questions 3, 5 and 6 which pertain to summary judgment:

(a) question 3: Whether, by reason of ss 103 and 106(3) of the Income Tax Act 1967, this court is wholly prevented from considering whether or not there are triable issues and/or some other reason warranting a trial (within the meaning of O 14 r 1 and O 14 r 3 of the Rules of Court 2012), before deciding whether or not to give judgment in favour of the plaintiff, despite the fundamental liberties, rights and powers enshrined in, inter alia, arts 5, 8 and 121 of the FC?

(b) question 5: whether O 14 r 3 of the Rules of Court 2012, which provides

A that a summary judgment application may be dismissed if a defendant can show 'some other reason' for a trial to be held, applies in civil recovery proceedings in tax matters? and

B (c) question 6: whether in instances of manifest and obvious errors in calculation of a tax assessment, a court is entitled by virtue of its inherent and judicial powers to consider a defendant's defence of merit to dismiss or set aside an application for summary judgment by a plaintiff and order full trial on the matter?

C **[149]** The ITA has a specific series of statutory provisions for the collection and recovery of the tax assessed to be due by the DGIR. These provisions are contained, as stated above, under ss 103–110 of Part VII of the ITA entitled 'Collection and Recovery of Tax'. It is not in dispute that this jurisdiction, like many others, operates on a 'Pay First, dispute later' design of tax imposition as D established by Parliament under the ITA.

[150] It is noteworthy that the questions posed by the appellants relate solely to Part VII on recovery and collection. These questions focus on the rules of E civil procedure relating to the recovery of debts in general, rather than the recovery of tax imposed under the specific provisions of the ITA read as a whole.

[151] There is a presumption made, both by the Inland Revenue and the F appellants that the only means of enforcement available is under O 14 of the Rules of Court 2012. However, O 14 envisages the court undertaking a final determination as to whether an amount is payable or due. This means that the court considers and ascertains whether a debt exists.

G **[152]** But under the ITA, ss 103 and 106 specify statutorily, for purposes of collection and recovery only, that upon assessment, the sum assessed is due and payable upon the lapse of a specified period of time. It becomes a statutory debt or a debt created by statute.

H **[153]** Section 103(1) provides: 'Except as provided in subsection (2) tax payable under an assessment for a year of assessment *shall be due and payable on the due date whether or not that person appeals against the assessment*'.

I **[154]** The section provides for two separate matters:

(a) that by statute the sum becomes due and payable on the due date; and

(b) that notwithstanding the taxpayer's right of appeal, the sum becomes due and payable.

[155] In other words, while the process of appeal is pending the tax becomes due, putting into effect the 'Pay first, dispute later' system that defers the dispute but requires immediate payment. This is an essential aspect of expeditious and efficient collection of tax which is required to enable the nation to function effectively. Therefore, notwithstanding the taxpayer's right to challenge the tax assessed through the SCIT and subsequently the hierarchy of the courts, payment is not deferred. Any seeming 'inequity' is met by the guaranteed right of repayment under the Act.

[156] The deferral of the challenge or dispute as to the tax assessed is further borne out by s 103B which provides:

> The institution of any proceedings under any other written law against the Government or the Director General shall not relieve any person from liability for the payment of any tax, debt or other sum for which he is or may be liable to pay under this Part.

[157] The Hansard in relation to s 103B states that the Government aims to ensure fair treatment between those who pay their taxes on time and those who do not. The latter group while seeking to challenge the tax assessed, are nonetheless required to make payment first while the challenge is deferred, because it would be unfair to those who pay their taxes on time if the latter category of taxpayers were accorded a longer time to meet their tax responsibilities simply by reason of their challenge (see Penyata Rasmi Parlimen, Dewan Rakyat, (Parliamen Keempat Belas, Penggal Ketiga, Mesyuarat Ketiga, 16 December 2020), Vol 54, at 26).

[158] As stated earlier, the tax assessed is, by way of statute, a debt due from the taxpayer to the Government. The section statutorily deems the sum assessed to amount to a debt recoverable in civil proceedings. The purpose, again is to facilitate recovery of the sum assessed.

[159] And to facilitate recovery s 106(3) limits the type of challenge that can be made *at this juncture, ie temporarily*. The right to raise those challenges and have them adjudicated upon is neither ousted or prohibited, as the ITA provides for such challenges to be taken vide the prescribed mode of appeal under Part V.

[160] What this all means in relation to recovery is that the ITA does not envisage a full-blown ventilation of all possible challenges to be determined at this stage of the tax process. It serves to ensure timely recovery and collection of tax due, while deferring the challenge to a later date. And this is where the utilisation of O 14 of the Rules of Court 2012 ('the ROC 2012') gives rise to confusion.

[161] Order 14 provides a summary basis for the collection of a debt in dispute. It provides a comprehensive mode of shortening the full litigation procedure by allowing, in suitable cases, for matters to be adjudicated upon fully, without the necessity for a full trial and witnesses. If the defendant to the summary judgment application however raises a 'triable' issue the matter then proceeds to trial. Whether judgment is granted summarily or judgment is granted after a full trial, the full merits and rights of the parties are litigated and the judgment handed down, is final in nature.

[162] *If a tax recovery 'debt' as statutorily provided for under s 106 is subjected to the procedure under O 14 of the ROC 2012, then the entire purpose and object of the ITA, which provides for a deferral of the full dispute to a later date under the adjudicatory process prescribed under the Act, is not met.*

[163] Even where there is no 'triable issue' found, *it must be remembered that the character and effect of the judgment granted under O 14 is final. However, under ss 103 and 106 the nature of the relief sought for purposes of recovery is plainly interim in character.*

[164] The use of the O 14 procedure gives rise to a situation where, if the recovery process is found to give rise to 'triable issues', it will result in a full-blown trial which examines the veracity of the statutory debt under s 106. Bearing in mind that the section provides for this statutory debt to be due and owing for the purposes of recovery only, and not with finality, the use of a summary process which seeks to allow for a full determination of whether the sum is due and payable, is not ideal given the purpose and object of the ITA.

[165] Once the statutory s 106 debt is subject to a full-blown trial, there cannot be another or second attempt at litigation under s 99(1) of the ITA as that would give rise to res judicata and/or issue estoppel. Therefore the entire purport and effect of the ITA would be thwarted by a full trial under the O 14 civil procedure under the Rules of Court 2012. This is in accord with the older case-law which stipulates that such defences are to be remitted to the equivalent of the then SCIT and not considered by the courts. To that extent there was appreciation of the fact that judgment under s 106 of the ITA was for purposes of ensuring payment of taxes first while disputes were adjudicated later.

[166] This then warrants the question whether O 14 is indeed the ideal mode to adopt in the course of recovery proceedings under s 106 of the ITA. It would seem from a perusal and construction of the Act *in toto*, that the procedure set out in s 106 of the ITA itself provides sufficient basis for recovery to be initiated in the civil courts by way of originating summons. The court is then able to ascertain whether:

(a) an assessment has in fact been made in the form prescribed under the Act;

(b) whether the tax assessed is due as the relevant time accorded for payment has lapsed; and

(c) whether the DGIR has accorded an exemption or provision for payment by instalments or reached some other agreement with the taxpayer which would warrant the court refusing to grant judgment.

[167] This means that s 106 of the ITA is given its full effect for the purpose of recovery while simultaneously allowing the taxpayer to proceed with his challenge vide s 99(1) of the ITA.

[168] The ITA allows for full judicial intervention and adjudication vide Part VI. Additionally, from a constitutional viewpoint, the right of judicial review, as well as an entitlement to a stay premised on the exercise of judicial discretion, remains.

[169] To reiterate, the enforcement provisions in ss 103 and 106 are themselves premised on the exercise of judicial power, so it cannot be said that judicial power is in any way ousted. There is merely a temporary restriction of the taxpayer's rights of challenge, which are deferred while allowing for payment first. The courts' powers remain unaffected. So when s 106(3) provides that the court shall not consider certain defences relating solely to the tax assessed, *it is the taxpayer's right to raise these issues at that juncture that is deferred, NOT curtailed*. The court's powers remain untouched as explained above.

[170] It is worth reiterating para 38 of *Capstone Pty Ltd* where Binns Ward J stated:

> Once it is accepted that the filing of a statement in terms of section 91(1)(b) is nothing more than an enforcement mechanism, as distinct from a means of determining liability, there is no basis for distinguishing it from any of the other recovery mechanisms ...
>
> ... It seems to me that the learned judge went awry in Mokoena by apparently regarding the filing of a statement in terms of section 91(1)(b) as having the rights-determining character of a judicially delivered judgment. It plainly does not ...

[171] In like manner *the judgment obtained under s 106 using the summary judgment procedure, does not have a rights-determining or liability-determining character, as it merely allows for recovery first for the purposes of enforcement or execution. It serves to give effect to the 'Pay first, dispute later' scheme in the ITA.*

[172] Even if a summary judgment procedure is adopted, the curtailing of the defences available as provided for in s 106(3) of the ITA and arguably, s 103(1) of the ITA and s 103B of the ITA, means that the issues there remain unavailable for adjudication by the court. This is because those matters would still comprise the subject matter of any appeal under s 99(1) of the ITA. Alternatively judicial review in exceptional cases is also available.

[173] We are now in a position to answer questions 3, 5 and 6:

(a) question 3: whether, by reason of ss 103 and 106(3) of the Income Tax Act 1967, this court is wholly prevented from considering whether or not there are triable issues and/or some other reason warranting a trial (within the meaning of O 14 r 1 and O 14 r 3 of the Rules of Court 2012), before deciding whether or not to give judgment in favour of the plaintiff, despite the fundamental liberties, rights and powers enshrined in, inter alia, arts 5, 8 and 121 of the Federal Constitution?

(b) question 5: whether O 14 r 3 of the Rules of Court 2012, which provides that a summary judgment application may be dismissed if a defendant can show 'some other reason' for a trial to be held, applies in civil recovery proceedings in tax matters? and

answer: No, it does not for the reasons we have stated. Pursuant to the 'Pay first, dispute later' scheme under the ITA, it follows that the recovery of the sum assessed at this stage is not final and the dispute will be heard by the SCIT and subsequently the court under the 'Pay first, dispute later' system.

[174] As we have reasoned, the claim for judgment by the Inland Revenue is premised on the characterisation of the sum assessed to be due as tax, under s 106(1) as a statutory 'debt'. This is for the purposes of recovery and execution only. The judgment obtained under s 106 is not a rights-determining judgment of finality. The taxpayer's right of challenge is *not* abrogated, as that right is preserved under s 99(1) of the ITA as well as judicial review.

[175] Therefore the 'some other reason' for a trial to be held under O 14 does not apply as a basis on which to enforce this statutory debt created by the taxing statute to enable payment to be made first, pending any challenge or dispute as to the sum assessed, which is effectively deferred under the statute. If it is found under the O 14 procedure that the matter should go to trial it would render the method prescribed under the Act for adjudication, nugatory. The Act should be construed such that the various sections are harmonious and provide a coherent structure for income tax collection.

[176] Therefore the use of other 'some other reason for trial' should not be invoked. It is not tenable for a s 106 debt to be determined finally at trial, if the

taxing statute also prescribes a specific manner of challenging the tax assessed, as is the case under the ITA. We have explained above in the body of the judgment that such a judgment does not enjoy the characteristics of a judgment issued after a full exercise of the court's dispute resolution powers. It is a judgment handed down for the purposes of collection, ie to enable recovery first, while the dispute is deferred. It does not enjoy the rights-determining character of finality which is to be found in a judgment delivered after full adjudication in a court of law.

[177] All challenges pertaining to those matters set out in s 106(3) or otherwise may be fully dealt with under the appeals portion of the ITA in Part VI, Section 2ITA which allows the taxpayer to ventilate all these issues. Further the remedy of *judicial review* in an appropriate case is also available. All this ensures that the taxpayer is accorded his 'fundamental liberties rights and powers in art 5 and art 121'.

[178] In short, a judgment granted under s 106 is treated as a civil judgment lawfully given in favour of the Inland Revenue *for the purposes of collection and recovery only.*

[179] Enforcement may involve a writ of seizure and sale or garnishment of any amount due, and if the sum assessed is found to be erroneous after the merits of a dispute have been dealt with in full under the s 99(1) challenge, the over-assessed portion will be refunded to the taxpayer. With the latest amendments to the ITA, such a refund will carry interest (see s 111D of the ITA). To that extent, the filing of civil proceedings in terms of s 106(1) is nothing more than an enforcement mechanism and is distinct from a means of determining liability.

[180] To this end, the DGIR and all authorised officers are designated as public officers to undertake proceedings under the section. This section provides support for the position that any proceedings instituted should be under s 106.

[181] It should be borne in mind that the statute that allows for recovery of tax is the ITA, and not the Rules of Court 2012, more particularly O 14. The latter provides a means of recovery of a disputed debt and envisages the determination of liability in full, either summarily or after a full trial if there is a 'triable' issue. Consequentially, it allows for a final judgment after determining liability between the parties.

[182] The s 106 of the ITA recovery mechanism under the ITA does not require such a final judgment, as we have explained at length.

[183] Accordingly, it is the remedy prescribed by statute that must prevail, not the procedure to recover a debt under the Rules of Court 2012. Therefore the statute should be accorded effect by allowing for the recovery or enforcement process under s 106 of the ITA to be followed.

THE USE OF THE SUMMARY JUDGMENT PROCEDURE OVER THE YEARS

[184] The bulk of the case-law relating to tax cases discloses that summary judgment has been the mode adopted to recover the tax assessed as a statutorily-deemed debt under s 106(1) of the ITA. If a summary judgment procedure is adopted as was the case in the present appeals in the courts below, the purpose and intent of the ITA does not envisage the court undertaking a rights-determining trial under s 106 of the ITA for the reasons explained above. In both appeals here, a summary judgment to obtain recovery of the debt, was adopted by the Inland Revenue and the defences put up by the appellants dismissed. The courts below recognised that the merits of the dispute were properly to be determined under s 99(1) of the ITA. Effect was correctly given to s 106(3) of the ITA.

[185] As such we are of the view that the result reached by the courts below is entirely correct, in that enforcement was facilitated by the grant of judgment under s 106 of the ITA. The fact that the courts below did not analyse the Act in its entirety to arrive at the conclusions we have, in relation to O 14 and the ITA, does not detract from the correctness of the end result. And that end-result was to dismiss all defences pertaining to matters arising under s 106(3) of the ITA. In any event we have previously concluded that s 106(3) of the ITA is constitutional and does not have the effect of usurping judicial power. So the application of the same by the courts below cannot be faulted.

[186] Having examined the defences put forward by the appellants, we concur that the defences stipulated there do not warrant examination under the ITA at this juncture. These defences, if raised, are to be the subject matter of full ventilation before the SCIT and after that, the High Court on points of law. As the judgment does not finally dispose of or determine the rights and entitlements of the taxpayer, the taxpayer is not prejudiced. He is however required to make the payment, or arrange for payment to be made in instalments or to reach an agreement with the DGIR on the settlement of the tax due, pending a full adjudication of the matter.

[187] The courts in the older cases relating to s 106 of the ITA did not consider the implications of utilising the summary judgment procedure under O 14 compared to the statutory provisions relating to the recovery of the tax assessed under ss 106 and 103. In point of fact, the suitability of the O 14

process was not considered at all. The focus was on the availability of another avenue of appeal within the statute to mount a challenge against the tax assessed as being a due. As there was another mode of appeal, it was not necessary to raise these challenges in the recovery proceedings. In short, the mode of recovery of the tax assessed was not the focal point of consideration. The recovery of the tax assessed to be due by civil proceedings, was equated with recovery by way of O 14.

[188] In *Comptroller of Income Tax v A Co Ltd* [1966] 2 MLJ 282, Choor Singh J summed up the law, and this was relied upon by Gill FJ in *Sun Man Tobacco*:

> ... The scheme of the Income Tax Ordinance is that if any person disputes the assessment, he may apply to the Comptroller to review and revise the assessment made upon him. If the Comptroller refuses to amend the assessment, the aggrieved taxpayer may appeal to the Board of Review ... and the board may, after hearing the appeal, confirm, reduce, increase or annul the assessmen or make such order thereon as to it may deem fit ... A taxpayer has no right to by-pass the Board of Review and take his complaint direct to court. And when the Comptroller of Income Tax sues a taxpayer to recover tax due under a notice of assessment, the taxpayer cannot be heard to say that the assessment on which tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the Board of Review. The provisions of Order XIV of the Rules of the Supreme Court must be read together with the provisions of the Income Tax Ordinance. If this is not done every unwilling taxpayer will refuse or pay tax and when sued in court, will challenge the merits of the assessment, thus causing considerable delay in the collection of tax ...

[189] This sums up the approach taken in the older cases where the matter of 'triable' issues were required to be laid before the then Board of Review, now the SCIT. But in this challenge the appellants have questioned the constitutionality of s 106(3) of the ITA, which they allege usurps the court's power to determine a matter finally under O 14 of the ROC 2012. And this is answered by a construction of the recovery section of the ITA under Part VII, which clearly envisages a judgment to be obtained pursuant to s 106 of the ITA to facilitate enforcement, thus ensuring the tax is paid first and the dispute is dealt with later.

[190] As such, the O 14 process should not override or supersede the statute-created process outlined in ss 103 and 106 of the ITA, which is for purposes of recovery and enforcement only.

[191] We now turn to answer question 6:

Question 6: Whether in instances of manifest and obvious errors in calculation

of a tax assessment, a court is entitled by virtue of its inherent and judicial powers to consider a defendant's defence of merit to dismiss or set aside an application for summary judgment by a plaintiff and order full trial on the matter?

Answer: In like manner this question centres on dismissing or setting aside a summary judgment which for the reasons set out above ought not to evolve in such a manner.

[192] If indeed there is a defence of merit which a defendant is unable to ventilate by reason of s 106(3) at the collection and recovery juncture, then this can still be undertaken vide the appeals process under s 99(1) of the ITA. There is no necessity for the court to resort to its inherent powers or 'judicial powers' when those powers are clearly preserved under the ITA because a *s 106* proceeding does not require the court to undertake or utilise its powers to determine the liability of the taxpayer. These provisions, namely ss 106 and 103 allow for recovery or execution, pending the dispute being heard on its merits.

OUR DELIBERATIONS AND ANALYSIS IN RELATION TO THE QUESTIONS OF LAW IN CATEGORY 3

[193] We shall now proceed to answer questions 7 and 8:

(a) question 7: whether the judicial power of the Federation that is vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a tax recovery suit filed under s 106(1) of the Income Tax Act 1967 on the basis of s 106(3) of the same Act?

(b) question 8: whether the judicial power of the Federation vested in the High Court, Court of Appeal and Federal Court may be suspended and/or abrogated in a tax recovery suit filed under s 106(1) of the Income Tax Act 1967 on the grounds that an appeal to the Special Commissioner of Income Tax has been filed under s 99 of the Income Tax Act 1967?

answer: we have answered these questions above in relation to questions 1, 2 and 4.

[194] As we have explained in the course of this judgment there is no question of judicial power being suspended or abrogated as is suggested in questions 7 and 8. Such a conclusion is untenable and does not arise when the ITA is construed holistically and purposively.

[195] Once again we reiterate that a perusal of the relevant sections bear out the fact that the recovery provided for under ss 103 and 106 are purely for enforcement purposes. The judgment thus obtained is not final in nature as any

instituted appeal remains to be determined in terms of whether such liability exists.

[196] Judicial power continues to reside with the courts, which are required under the statute to exercise their full judicial powers after the SCIT, as a specialist tribunal, has heard and decided on the tax appeal put forward by the taxpayer. To reiterate, the right to have the taxpayer's dispute heard in full, is simply deferred, to enable payment to be made first by way of recovery.

[197] Finally, as other forms of judicial intervention are not ousted, the right to seek a stay or to resort to judicial review (which require exceptional circumstances) remains.

[198] To that extent the questions put forward fail to appreciate the design and operation of the taxing statute as a whole. It is only if a grammarian construction is adopted in relation to ss 103 and 106 of the ITA *in vacuo*, such that no regard is accorded to the context in which those provisions sit within the ITA read as a whole, that such a conclusion can be reached. If, conversely, the tax statute is read in its entirety, bearing in mind that it prescribes a 'Pay first, dispute later' scheme, it will be clear that the judgment under s 106 serves to facilitate recovery for purposes of enforcement at this juncture only.

[199] We now answer question 9:

Question 9: Whether a defendant's defence as to the plaintiff's conduct of bad faith, mala fide, oppression, unconscionability, irresponsibility, unreasonableness and/or abuse of process falls within the scope of s 106(3) of the Income Tax Act 1967, and whether the courts are entitled to consider such a defence as a triable issue and/or some other reason warranting a trial in the context of civil recovery proceedings in tax matters (including in summary judgment proceedings therein).

Answer: This question asks in effect whether bad faith, mala fides, oppression, unconscionability and unreasonableness or abuse of process fall within the purview of s 106(3) of the ITA.

[200] For the reasons we have set out in detail above it follows that such issues are not properly dealt with under the statutory s 106 of the ITA civil proceedings, which are for purposes of recovery and execution only.

[201] There is however nothing to stop the taxpayer from pursuing these matters under the appeals process in s 99(1) to the SCIT and the subsequent appeals on matters of law to the High Court and the appellate courts.

Moreover, judicial review is available in exceptional circumstances.

[202] Therefore the answer is no.

THE ARTICLE 5 ARGUMENT

[203] The present arguments in these appeals relate to the constitutionality of a specific provision in the ITA in relation to its alleged contravention of art 121 of the FC and seeks the remedy afforded in art 4(1) of the FC. Nonetheless, it is important to outline the features of the Federal Constitution that allow for the promulgation of valid tax laws. The ITA is validly promulgated pursuant to the Federal Constitution. The constitutional power of Parliament to make laws imposing taxation is set out in art 96 of the Federal Constitution:

> 96 No tax or rate shall be levied by or for the purposes of the Federation except by or under the authority of federal law.

[204] It is evident that the constitutional power of Parliament to make laws imposing taxation is wide. However, all power is subject to constraints as was recognised, inter alia, in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

[205] Amongst these constraints is the ability of a citizen to contest the tax levied on him. Legislation which deprives the citizen of this ability would be contrary to, inter alia, art 5(1) of the FC. In other words, the assessment of the DGIR should be contestable otherwise it would result in the onerous and oppressive consequence of citizens being subject to an administrative assessment without recourse. And such an administrative power if allowed unchecked would attack the very validity of the law under the Federal Constitution.

[206] As explained above, the ITA does allow for the challenge and contestability of tax imposed, by providing for recourse to the courts or the exercise of judicial power. Firstly the ITA expressly allows for such a contest through its appeals procedure in s 99(1).

[207] Secondly, the Federal Constitution provides firstly for constitutional judicial review in art 4(1) of the FC. This is the judicial power of the court to read down or strike out legislation where it is not in conformity with the provisions of the Federal Constitution. This is seen in the present appeals where the very validity of a statutory provision is challenged in the course of an appeal from summary judgment proceedings.

[208] Further, the High Court under the Schedule to sub-s 25(2) of the Courts of Judicature Act 1964 ('the CJA') delineates the additional powers of the High Court apart from those provided under art 121. This makes reference to the prerogative writs of certiorari, mandamus and prohibition:

> Prerogative writs
>
> 1. Power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[209] These prerogative writs afford remedies by which the superior courts are empowered to ensure that statutory bodies and inferior tribunals conform with provisions of the Federal Constitution and the legislation pursuant to which these entities exercise their powers. It checks abuses of power, and unbridled exercise of statutory power by officials of the government who carry out their duties under specific legislation or other statutory powers. It ensures that these bodies, acting through their officials, adhere to the rule of law. And administrative judicial review achieves this by affording the remedies of the prerogative writs in their many forms to aggrieved individuals or groups.

[210] The CJA confers the jurisdiction to the High Court, in the exercise of its discretion, to afford such prerogative remedies in appropriate cases. The mode of obtaining such relief is the process of administrative judicial review.

[211] In short, the exercise of taxing powers by the Inland Revenue which is administrative in nature is subject to judicial review, both constitutional (where the validity of a specific provision is challenged) and is also amenable to administrative judicial review. However, the grant of these reliefs is rare. In most cases the remedies afforded by judicial review are rarely, if ever granted, largely because a more convenient or satisfactory remedy is available. As in the present appeals, where s 99(1) of the ITA provides a specialist tribunal to assess and determine the taxpayer's grievance and which result is susceptible to appeal and review before the superior courts.

[212] The availability of judicial review in tax cases is generally confined to rare cases where for example, what is said to be an assessment is not in fact an assessment (see Andrew Chew Peng Hui, *Tax Appeals in Malaysia: Law and Procedure* (Malaysia: Thomson Reuters, 2021) at 181). In exceptional cases review may be available in cases of deliberate mal-administration. It is incumbent on the taxpayer to establish exceptional circumstances of a kind which result in the assessment falling outside the scope of assessments as provided for in s 106 of the ITA.

[213] What is not permissible is allowing collateral challenges to assessments through judicial review, when the appeals procedure is the proper mode to be adopted. This can give rise to abuse of the remedy, by the use of the same to put forward disguised challenges to quantum or the basis of assessment, all of which can and should be more properly dealt with under s 99(1) of the ITA and the appeals process. Judicial review is liable to be utilised as a tactic sought by taxpayers to delay the statutory processes in the Act, until the judicial review proceedings are complete. This may be dealt with by provision for the review and statutory appeals to the High Court to be dealt with together, but inevitably there will be delay. Therefore judicial review is not to be lightly filed and where it is used as a delay tactic, it is clearly an abuse of the court process and should be dealt with accordingly.

[214] For these reasons, contrary to the appellants' and amicus curiae's submissions on this point, we are of the considered view that s 106(3) of the ITA is constitutional and cannot be said to encroach upon judicial power nor contravene art 5(1) of the FC in terms of the right to a fair trial or access to justice. As we have rationalised, judicial power is inherent in the taxation process and is neither abrogated, removed nor suspended.

THE ARTICLE 8 ARGUMENT

[215] The appellants also complain that s 106(3) of the ITA puts them on an unequal footing with the respondent as it confers wide powers on the latter in respect of tax matters and is consequently violative of the appellant's right to equal treatment under art 8 of the FC. This view is shared by amicus curiae.

[216] The law in relation to art 8 of the FC has to be applied with considerable prudence and vigilance. As mentioned earlier, the government enjoys a wide latitude in formulating approaches for the execution of fiscal and economic policy. Judicial intervention within this sphere should be exercised sparingly contingent upon statutory provisions or constitutional imperatives.

[217] The rationale for such judicial deference in tax matters is explained by Durga Das Basu, *Commentary on the Constitution of India* (Vol 2, 9th Ed) (India: LexisNexis, 2019) at pp 2306–2307 in the following terms:

> Taxing statutes enjoy more judicial indulgence because picking and choosing within limits is inevitable in taxation. The principle of classification is applied somewhat more liberally in the case of a taxing statute. In *Khandige v Agricultural* ITO AIR 1963 SC 591, the Supreme Court said that in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long as it adheres to the fundamental principles underlying the said doctrine.
>
> The power of the Legislature to classify is of 'wide range and flexibility' so that it can

adjust its system of taxation in all proper and reasonable ways. In a subsequent decision, it was observed 'when the power to tax exist, the extent of the burden is a matter for discretion of the lawmakers. It is not the function of this court to consider the propriety or justness of the tax or enter upon the realm of legislature policy. If the evident intent and general operation of the tax legislation is to adjust the burden with a fair and reasonable degree of equality, the constitutional requirement is satisfied (see *Hoechst Pharmaceuticals Ltd v State of Bihar* AIR 1983 SC 1019; *Satnam Overseas (Export) v State of Haryana & Anr* (Case No Appeal (Civil) 11174 of 1995).

[218] Furthermore, the court will not ordinarily interfere with the choice of the Legislature in matters pertaining to the mode and manner of recovery of taxes (see Durga Das Basu, *Commentary on the Constitution of India* (Vol 2, 9th Ed) (India: LexisNexis, 2019) at p 2309.

[219] Article 8(1) of the Federal Constitution provides that:

All persons are equal before the law and entitled to the equal protection of the law.

[220] Article 8(1) of the Federal Constitution means that a law may not discriminate for or against a person or class unless there is a rational basis for such discrimination. Article 8(1) of the Federal Constitution permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question (see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116). This is the test of constitutionality under art 8(1).

[221] Since the economic wisdom of a tax statute is within the exclusive province of the Legislature and questioning the legislative policy is beyond the domain of the judiciary, tax legislation is subject to a less rigorous anti-discrimination test.

[222] For a tax statute to pass the test of permissible classification, two conditions must still be fulfilled:

(a) the classification must be founded on intelligible differentia which distinguish persons or things that are grouped together from others left out of the group; and

(b) the differentia must have a rational relation to the object sought to be achieved by the statute. The classification must not be arbitrary, artificial or evasive, but must be based on some real and substantial distinction bearing a just and reasonable relation to the object to be achieved by the legislature (see Singhal and Joshi, *The MLJ Manual on the Constitution of India* (Vol 1) (India: LexisNexis, 2016) at p 235).

[223] The first point of difficulty is that of classification. Is the Government available for classification as 'a person' and consequently can its levy of tax on the appellants amount to discrimination under art 8 of the FC in the manner contended by the appellants? We are of the view that such an argument is without merit.

[224] This is because where the Government acts in its public capacity and in the exercise of its ordinary governmental functions, a subject, such as the appellants, cannot claim equality with the Government (see *Amraoti Electric Supply Co Ltd v NH Mujumdar* ILR (1952) Nag 830; AIR 1953 Nag 35). The function of levying tax is a sovereign function of the Government and cannot therefore be treated as a private function of the Government so as to make it a 'person' within the meaning of art 8 of the FC (see *RM Seshadri v Second Additional Income-Tax Officer, Salaries Circle, Madras and another* (1954) 2 MLJ 285; ILR (1954) Mad 1236; AIR 1954 Mad 806), as the appellants seek to do here.

[225] This contention is not therefore available to the appellants as the respondent in levying tax on them is carrying out its public function and is in that context not a 'person' within art 8 of the FC.

[226] Secondly, the Inland Revenue is levying tax on the appellants in the same manner that it does for all citizens of the nation. The appellants have not been singled out for discriminatory treatment nor treated in a manner not provided for in the ITA. There is no evidential basis on record to support such a contention. Accordingly, there is no basis for the contention that there has been a contravention of art 8 of the FC.

[227] The second limb of the test stipulates that the intelligible differentia must have a rational relation to the object sought to be achieved by the statute. Here the ITA has the object of ensuring that taxes are collected efficiently and expeditiously in the interests of the citizens of the nation as a whole. s 106(3) of the ITA as we have construed it, serves that object most rationally. It has a rational relation to the collection of taxes efficiently and expeditiously in that it serves to ensure that for the purposes of enforcement s 106(3) of the ITA precludes matters which are deferred to the dispute resolution mode specified in the statute. Therefore, it satisfies that aspect of the test for art 8 of the FC too. It passes the constitutional validity test.

THE INLAND REVENUE'S CERTIFICATE PURSUANT TO S 142(1) OF THE ITA

[228] It is contended by the appellants that contrary to s 142(1) of the ITA the certificate was not signed by the DGIR himself. The section provides as

follows:

> In a suit under section 106 the production of a certificate signed by the Director-General giving the name and address of the defendant and the amount of tax due from him shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgment for that amount.

[229] It is not in dispute that the Director-General himself did not sign the s 142 certificates in relation to the appellants.

[230] The certificates are signed by one 'Zainun bt Ahmad' who is the Chief Assistant Director of the Inland Revenue. The appellants contend that there is no evidence produced by the Inland Revenue that Zainun bt Ahmad possesses the requisite authorisation to sign the certificates. More specifically they state that there is no evidence of delegation of the Director-General's powers in relation to the certificate. Nor is there evidence of Zainun bt Ahmad's name having been gazetted as an officer who is authorised to sign the s 142(1) certificate.

[231] Section 136(2) of the ITA provides that:

> Any officer appointed under paragraphs 134(2)(b) and (c) may exercise any function of the Director General under this Act (not being a function exercisable by statutory order or a function exercisable under section 152) except his function under section 44, subsection 137(1) and section 150.

[232] An Assistant Director for Inland Revenue falls within s 134(2)(b) of the ITA. Accordingly, the Assistant Director for Inland Revenue, Zainun bt Ahmad is statutorily entitled to exercise the function of the Director General under s 142(1) of the ITA. The fact that she has done so, is apparent from a persual of the certificate itself. It is therefore in accordance with the provisions of the ITA.

[233] The appellants now assert that she has no authority to do so on the basis that no notification by gazette was produced by the Inland Revenue. This contention is misconceived because having produced the s 142 certificate and bearing in mind s 136(2) of the ITA and s 134(2)(b) of the ITA, the onus lies on the appellants as the ones making the assertion to establish otherwise. It is insufficient to simply throw a bare allegation and seek to reverse the onus of proof which lies on them. Therefore there is no merit in this contention.

THE CONSEQUENCES OF STRIKING DOWN S 106(3) OF THE ITA

[234] During the course of oral submissions, we questioned counsel about the potential effect of striking down s 106(3) of the ITA on government coffers.

A The appellants' answer to this, which is echoed by amicus curiae, is that since collections made under s 106(3) of the ITA form only a small portion of overall revenue collections (ie an average of 1% of total revenue collected based on the respondent's annual reports), government reserves would not be substantially affected even if the respondent is not able to collect disputed assessments under
B s 106(3) of the ITA.

[235] We are of the view that such an approach is unsustainable, particularly given our construction of the provision. If s 106(3) of the ITA is struck down by this court, then the special mechanism laid down by the Legislature to
C question the merits of the assessment before the SCIT would be rendered otiose. It would be open for aggrieved taxpayers to dispute the quantum of the assessment in court instead. Not only will this foreseeably clog up the Judiciary's caseload, but it will also have the undesirable effect of impeding the efficient and expeditious collection of taxes under the ITA.
D

[236] We also fail to comprehend how either the appellants or amicus curiae can conclude with no basis that government reserves will not be 'substantially affected' by a delay of possibly years in the collection of taxes which are disputed under s 106(3) of the ITA.
E

[237] It is important to note that the power of constitutional review contained in art 4(1) of the FC is a formidable instrument and should be wielded by the Judiciary with great care. If it were to be used indiscriminately
F or where there is no substantive basis for its invocation, the results could cause considerable damage. In the instant appeals, it could stultify the tax collection system of the nation as validly provided for, and adversely affect the functioning of the Government and the peoples.

G **[238]** In the instant appeals, we are satisfied there is no basis for the contention that judicial power has been in any way abrogated, removed or usurped by the impugned statutory provision, namely s 106(3) of the ITA. The alleged infringement of arts 5 and 8 of the FC is not made out. It therefore follows s 106(3) of the ITA is constitutional. In these circumstances we dismiss
H the appeals with no order as to costs.

Appeals dismissed.

Reported by Ashok Kumar

I